No. 73-1513

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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UNITED STATES OF AMERICA, PETITIONER

v.

RONALD S. JENKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-41a) is reported at 490 F. 2d 868. The opinion of the district court, which is contained in a document entitled "Findings of Fact and Conclusions of Law" (App. B, *infra*, pp. 42a-52a), is reported at 349 F. Supp. 1068.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1973 (App. C, *infra*, pp. 53a-54a). A timely petition for rehearing was denied on February 6, 1974 (App. D, *infra*, pp. 55a-56a). By order of February 28, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the United States from appealing an order of the district court dismissing an indictment, after a trial without a jury, where the district court found that the defendant committed the acts charged in the indictment but concluded as a matter of law that the defendant had established an affirmative defense, and where the error of the district court can be corrected without a retrial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 3731, as amended by Title III of the Omnibus Crime Control Act of 1970, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. In an indictment returned in the United States District Court for the Eastern District of New York, respondent, a registrant under the Universal Military Training and Service Act, was charged with having "knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to submit to induction into the armed forces of the United States, after notice had been given to the defendant by Local Board No. 50, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 24th day of February, 1971," in violation of 50 U.S.C. App. 462(a) (C.A. App. A-1).

The case was tried before the district court without a jury. On October 24, 1972, the district court filed a document entitled "Findings of Fact and Conclusions of Law" (App. B, *infra*, pp. 42a-52a). The district court found that, as charged in the indictment, "the Local Board mailed to defendant * * * an

Order to Report for Induction on February 24, 1971," which was received by him, and that "[t]he defendant did not report for induction on February 24, 1971" (*id.* at 43a-44a).[1]

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[1] The "Findings of Fact" were as follows:

1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

2. Defendant registered with Local Board No. 50, Brooklyn, New York, on September 23, 1966.

3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

4. On January 20, 1971, the defendant was given a pre-induction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board and requested SSS Form 150 for a conscientious objector classification.

7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his request for a postponement of his induction had been denied.

8. The defendant did not report for induction on February 24, 1971.

9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971.

The district court then proceeded, under the heading "Discussion," to discuss respondent's defense to the indictment "that at the time of his alleged commission of the crime, viz., his refusal to submit to induction, the law of the Second Circuit [since overruled by *Ehlert* v. *United States*, 402 U.S. 99] was such that he was entitled to a postponement of his induction to enable the Board to pass on his claim for C.O. status" (App. B, *infra*, p. 44a), a claim which he had concededly asserted for the first time *after* receiving his notice to report for induction (*id.* at 43a).

The district court agreed with respondent's claim regarding the applicable law of the Second Circuit at the time the local board declined to reopen his classification, and it concluded further that "the defendant JENKINS would be [prejudiced] by a retroactive application of *Ehlert*," presumably because he may have refused induction in the belief that he had a right to be heard on his late crystallization claim prior to being compelled to report for induction[2] (*id.* at 50a). Accordingly, the district court con-

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[2] The district court made no express finding that Jenkins had in fact relied on "the applicable law of the Second Circuit." The reason for the absence of such finding is that neither the respondent nor the draft counselor with whom he consulted, and who was called to testify to respondent's sincerity (C.A. App. A-144), testified that they had relied on "the applicable law of the Second Circuit." Respondent's claim was that the local board was bound to follow "the applicable law of the Second Circuit" (even though that "law" was subsequently held to be erroneous) and that the lawfulness of the local board's action must be viewed in light of the law at the time.

cluded that it "cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law" (*id.* at 52a). Under the heading "Conclusions of Law," the district court stated that "[t]he indictment in this case is dismissed and the defendant is discharged" (*ibid.*).

2. Shortly after this decision, the Court of Appeals for the Second Circuit decided *United States* v. *Mercado*, 478 F. 2d 1108, which cast serious doubt on the legal conclusion of the district court. There, discussing the effect of *Ehlert* v. *United States*, 402 U.S. 99, on pre-*Ehlert* refusals to report for induction, the court of appeals stated that "[u]pholding the conviction of a registrant who claims to have relied on the pre-existing case law would appear to be no more than an application of the settled rule that an erroneous belief that an induction order is invalid, even if based on the advice of counsel, is not a defense to a prosecution for refusing induction, and that one who refuses induction on the basis of such a belief acts at his peril" (478 F. 2d at 1111). Moreover, while the court of appeals recognized that such a rule may operate harshly "as applied to a registrant who in fact reasonably relied in good faith on the case law," no such showing could be made by a registrant (like respondent) who refused induction in the early part of 1971, "when there was widespread disagreement among the courts of appeals and the question had been argued and was pending decision in the Supreme Court" (*ibid.*).

Since the order of the district court here conflicted with the holding of the district court in *Mercado*, which was then pending on appeal from a judgment of conviction, the Solicitor General authorized an appeal to the court of appeals pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. The Act, which was adopted to "assure that the United States may appeal [to the court of appeals] from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits,"[3] authorizes an appeal to the court of appeals from a decision, judgment or order of a district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution." Although respondent had been placed in jeopardy, and a dismissal after jeopardy might preclude a second trial, the United States argued that an appeal was not barred by the Double Jeopardy Clause because it was not seeking a retrial, but simply a direction to the district court to enter judgment in accordance with the evidence adduced at the trial.

The court of appeals concluded that Congress intended to authorize an appeal from an order of the district court terminating a criminal prosecution in all cases in which an appeal would not violate the Double Jeopardy Clause (App. A, *infra*, p. 5a):

> Appellant asserts, and appellee does not dispute, that Congress intended to extend the Gov-

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[3] S. Rep. No. 91-1296, "Amendments to the Criminal Appeals Act," 91st Cong., 2d Sess., pp. 2-3.

> ernment's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set at rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91-1296, at 4-13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal.

The majority of the court of appeals, however, over the dissent of Judge Lumbard, held that an appeal was barred by the Double Jeopardy Clause. The majority reasoned that, "for double jeopardy purposes," the district court judge had acquitted the respondent (*id.* at 26a):

> His ruling was based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case. The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in *Ehlert* should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in *Ehlert*, and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact.

Although a reversal of the order of the district court would not have necessitated a retrial, but only

a direction to the district court to enter a judgment in accordance with its findings, the court of appeals held that the Double Jeopardy Clause barred an appeal—that, in effect, the appeal itself placed the defendant in jeopardy a second time.[4] In reaching this conclusion the court of appeals relied principally on what it characterized (App. A, *infra*, p. 16a) as the "dictum" in *United States* v. *Ball*, 163 U.S. 662, 671, that an acquittal can "not be reviewed, on error or

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[4] The majority opinion below indicated that it was "not certain" that, if it agreed that the district court had erroneously dismissed the indictment, further trial proceedings would not be warranted (App. A, *infra*, p. 28a). It noted that in *United States* v. *Mercado*, *supra*, it had recognized the possibility of a successful defense by "a registrant who in fact reasonably relied in good faith on the case law or upon the knowledge that local boards in this circuit would consider a belated conscientious objection claim" (478 F. 2d at 1111). The court of appeals nevertheless did not resolve this issue, but decided the double jeopardy issue on the assumption that there would be no "need for a second trial" (App. A, *infra*, p. 28a).

We merely observe that, in indicating uncertainty regarding the possible need for further proceedings, the court of appeals apparently overlooked the fact that respondent had refused induction during that period of time when *Mercado* held it would have been impossible to establish justifiable reliance on existing law. And respondent could not have relied on a belief that his claim would be considered by the local board, because the district court found that respondent was advised the day before he was due to report for induction that his request for a postponement had been denied (App. B, *infra*, p. 44a). Moreover, even if additional proceedings were necessary, it would not have been a "retrial" of issues previously litigated (*King* v. *United States*, 426 F. 2d 278, 279 (C.A. 9)), but merely a reopening of the defense case to permit respondent to introduce evidence which he should have put in during his defense at trial.

otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." While the court of appeals found that this dictum had been followed in subsequent cases (*Kepner* v. *United States*, 195 U.S. 100; *Fong Foo* v. *United States*, 369 U.S. 141; and *United States* v. *Sisson*, 399 U.S. 267), it suggested that a "[r]eexamination of the dictum in *Ball* * * * may well be desirable, particularly now that the Double Jeopardy Clause has been extended to the states"; it concluded, however, that "this is far beyond our power as an inferior court" (App. A, *infra*, pp. 29a-30a, n. 20).

Judge Lumbard, who dissented from the holding of the majority, concluded that "the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case" (App. A, *infra*, pp. 40a-41a):

> An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice. Only last term, the Supreme Court in *Illinois* v. *Somerville*, 410 U.S. 458 (1973), rejected the notion that technical errors resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again." 410 U.S. at 470.
>
> I believe that the "ends of public justice" will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law. That Jenkins is guilty would appear to be indisputable in light of our decision in *United States* v. *Mercado*, 478 F.2d 1108 (1973), in which we held without reservation that even prior to *United States* v. *Ehlert*, the law of this circuit was that an individual had to report for induction although his post-induction notice claim for conscientious objector status was still pending.
>
> Accordingly, I would vacate the order of the court below and remand for a proper application of the law. [Footnote omitted.]

REASONS FOR GRANTING THE WRIT

1. The Criminal Appeals Act, as amended by the Omnibus Crime Control Act of 1970, 84 Stat. 1890, was expressly intended to authorize an appeal from an order of a district court terminating a criminal prosecution in all cases in which such an appeal would not violate the Double Jeopardy Clause. Although it was anticipated that the revised Criminal Appeals Act, unlike its predecessor, would provide a clear, rational scheme governing appeals by the United States (*United States* v. *Sisson*, 399 U.S. 267, 306-307, n. 61, and 307-308, "[t]his appeal by the United States from a judgment of the District Court for the Eastern District of New York dismissing an indict-

ment after a bench trial [as the court of appeals observed] is the latest in a growing list of cases showing that the eagerly awaited 1970 amendment of the Criminal Appeals Act, 18 U.S.C. § 3731, has not resolved all the problems in this area" (App. A, *infra*, p. 2a). The principal reason for the growing conflict and uncertainty,[5] however, does not arise from the language of the Act, which has been consistently construed to authorize appeals by the United States in criminal cases "as far as [Congress] constitutionally could" (*id.* at 5a),[6] but from the cases construing the Double Jeopardy Clause—cases which, as one commentary has observed, are "frequently both illogical and irreconcilable." Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life For A Moribund Constitutional Guarantee*, 65 Yale L.J. 339 (1956).

This case presents the Court with an opportunity to clarify and reconcile some of the past decisions construing the Double Jeopardy Clause, and to do so in the context of a case which will have broad ramifications and application to a wide variety of situations. The holdings of the court of appeals—(1) that a defendant is acquitted "for double jeopardy purposes" whenever a district court sustains an affirmative defense (or other legal claim going to the merits) on the basis of facts developed at trial; and (2) that the Double Jeopardy Clause bars appellate review of that determination, even where a retrial is not necessary to correct the error of the district court—will directly affect the right of the United States to appeal to the court of appeals in two significant areas in which errors of a district court may be corrected without the necessity of a retrial. Under the reasoning of the court of appeals, it will be impossible for the United States to appeal from (1) post-trial dismissal orders in cases tried without a jury, where findings of fact are made[7] that require conviction, but where the district court, because of an error of law, has sustained an affirmative defense or other legal claim going to the merits, and (2) all post-conviction dismissal orders in cases tried by a jury (where the verdict of guilty is the equivalent of the findings of fact made here by the district court), sustaining affirmative defenses or other legal claims going to the merits.

Moreover, if permitted to stand, the holding below will create another illogical and irreconcilable precedent in this area. For example, had the district court here entered a judgment of conviction, and had the defendant prevailed on his defense in the court of appeals, that order would have been as much an "acquittal for double jeopardy purposes" as was the

[5] There are two petitions for certiorari presently pending, one filed by the United States (*United States* v. *Wilson*, No. 73-1395) and one filed by a defendant (*Serfass* v. *United States*, No. 73-1424), raising separate but related issues, which demonstrate the conflict and confusion presently pervading this entire area (see pp. 21-24, *infra*).

[6] Because we agree with the court of appeals' construction of the statute, our discussion herein is confined to the constitutional issue presented.

[7] Fed. R. Crim. P., Rule 23(c).

order of the district court. If a subsequent appeal in effect places the defendant in jeopardy a second time, even though a retrial is not sought, then a petition for certiorari would likewise be barred. Since this is clearly not the law, *Forman* v. *United States*, 361 U.S. 416, 426, the illogical consequence of the holding of the court of appeals is that the action of a single district court judge terminating a criminal prosecution is final and unappealable even though a retrial is not sought, but the holding of three judges of the court of appeals to the same effect is not final and is subject not only to rehearing *en banc* but to review by this Court.

The petition for certiorari should be granted to resolve this anomaly and to clarify the meaning and scope of the Double Jeopardy Clause in an area of substantial importance to the administration of criminal justice in the federal courts. Such clarification is particularly appropriate, as the court of appeals has observed, "now that the Double Jeopardy Clause has been extended to the states" (App. A, *infra*, pp. 29a-30a, n. 20).[8] Review by this Court is also important to insure that the policy of Congress to permit government appeals on questions of law in criminal cases insofar as constitutionally permissible is not being undercut by an unduly broad interpretation of the double jeopardy prohibition.

[8] We note in this regard that the holding of the Court of Appeals for the Second Circuit casts doubt on the validity of statutes, authorizing appeals by the state, which are on the books in every State within its jurisdiction. See New York C.P.L. § 450.20; Conn. Gen. Stat. Ann. § 54-96 (Supp. 1973); Vt. Stat. Ann., Title 13, § 7403.

2. The court of appeals misconstrued and misapplied the holdings of this Court interpreting the Double Jeopardy Clause. The majority opinion exhaustively traces the genealogy of the Double Jeopardy Clause, but it ultimately ignores both the history and purpose of that provision. The common law rule, which the Double Jeopardy Clause largely reflected (*Kepner* v. *United States*, 195 U.S. 100, 125), was directed to applications by the prosecutor for a new trial following a jury verdict of acquittal. Friedland, *Double Jeopardy*, pp. 285-287 (1969).[9] "The underlying idea," Mr. Justice Black has written for the Court, "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. * * * Thus it is one of the elemental principles of our criminal law that the Government cannot *secure a new trial* by means of an appeal even though an acquittal may appear to be erroneous." *Green* v. *United States*, 355 U.S. 184, 187-188 (emphasis added); *Palko* v. *Connecticut*, 302 U.S. 319, 328.

Here, the court of appeals ignored both the "elemental principle" and the "underlying idea" of the Double Jeopardy Clause by relying for its hold-

[9] It appears that at common law in England an appeal, such as that here, could be taken by the Crown. Friedland, *supra*, at p. 297, nn. 2-3.

ing on "dictum" (App. A, *infra*, p. 16a) in *United States* v. *Ball*, 163 U.S. 662, and on what it characterized as the holding of three other cases,[10] to sustain its conclusion that an appeal by the United States, seeking to correct an error of law by the district court without the necessity of a retrial, places the defendant in jeopardy a second time (App. A, *infra*, p. 29a):

> The short of the matter is this: *Kepner* held that an acquittal on the general issue barred an appellate court from entering a judgment of conviction on appeal. Since under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy clause protects only against the vexation of a second trial. *Fong Foo* held that a directed acquittal barred a retrial even when it was plain that the acquittal was occasioned by clear error of the judge. *Sisson* held that when a guilty verdict had been nullified by a judge's decision to acquit on the merits, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction. We cannot see how in the circumstances here presented the Government can thread a way through this thicket so long as these decisions stand. [Footnote omitted.]

The "thicket," we submit, is not nearly so dense as the majority suggests. *United States* v. *Ball*, 163 U.S. 662, was a case in which "[t]he verdict of the

[10] *Kepner* v. *United States*, 195 U.S. 100; *Fong Foo* v. *United States*, 369 U.S. 141; *United States* v. *Sisson*, 399 U.S. 267.

jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge * * *" (163 U.S. at 670); it was held there that such a verdict "could not be reviewed, on error or otherwise, without putting him twice in jeopardy" because "a verdict of acquittal * * * is a bar to a subsequent prosecution for the same offence" (163 U.S. at 671). The acquittal in *Ball*, on a general verdict, was tantamount to a finding of fact that he had not done the acts charged. Accordingly, the "dictum" lends no support to the holding below, since the defendant here was, in effect, found guilty of the acts charged in the indictment, and the dismissal order was based on application of a legal principle to undisputed facts. Moreover, the correction of that error will not involve "a subsequent prosecution for the same offence."

Kepner v. *United States*, 195 U.S. 100, was a case in which the defendant had been tried in the Philippines without a jury and acquitted by the trial judge. Under Philippine law an appeal was authorized from such an acquittal, and the appellate court had the authority to make *de novo* findings of fact on appeal. Citing *United States* v. *Ball*, *supra*, the Court held that such an appeal is barred by the Double Jeopardy Clause (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government.

> *The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense* * * *. [Emphasis added.]

The trial "upon the merits" to which the Court alluded in *Kepner* resulted from the peculiar nature of the appellate review afforded by Philippine law, pursuant to which, in Kepner's case, the appellate tribunal weighed the credibility of witnesses, made new findings of fact, and entered a judgment of conviction. But it cannot reasonably be maintained that when an appellate court determines that the district court erred as a matter of law in dismissing an indictment, and accepts as true all of the facts found by the district court, it is conducting a retrial on the merits.[11] Certainly *Kepner* stands for no such proposition.

Moreover, this consideration aside, it must be remembered that *Kepner* did not involve a construction of the Double Jeopardy Clause, but the construction of an Act of Congress, applicable to the Philippines, which incorporated the double jeopardy principle. While it is true that, in the course of the opinion

[11] On this analysis, this Court has been violating the Double Jeopardy Clause for years by granting petitions for writs of certiorari in cases where courts of appeals, accepting as true the findings of the trier of fact, have ordered dismissal of indictments on the merits, based on their application of legal principles to undisputed facts. See, *e.g.*, *United States* v. *Maze*, No. 72-1168, decided January 8, 1974; *United States* v. *Russell*, 411 U.S. 423; *United States* v. *Seeger*, 380 U.S. 163.

in *Kepner*, the Court indicated that it regarded the statutory provision as having the same effect as the Fifth Amendment, this Court has subsequently admonished that such language is to be regarded as dictum and is not "conclusive" in cases "where the interpretation of the Fifth Amendment is necessarily decisive" (*Green* v. *United States*, 355 U.S. 184, 197, n. 16).[12] See also, *Abbate* v. *United States*, 359 U.S. 187, 198, n. 2 (separate opinion of Mr. Justice Brennan).

Equally inapposite is *Fong Foo* v. *United States*, 369 U.S. 141, which involved a directed verdict of acquittal in a jury trial and in which the relief sought would have required "that the petitioners be tried again for the same offense" (369 U.S. at 143).[13] Here, as we have emphasized, no such retrial will result.

The last case upon which the majority relied is *United States* v. *Sisson*, 399 U.S. 267. There, after a jury had convicted the defendant of failing to report for induction, the district court in effect terminated the prosecution on the basis of its conclusion that under applicable legal principles the evidence was insufficient to sustain the defendant's guilt. The Court held that this was in effect an acquittal and

[12] In *Green*, the Court was referring to *Trono* v. *United States*, 199 U.S. 521, a case decided a year after *Kepner*, which also involved an interpretation of the statutory double jeopardy provision applicable in the Philippines.

[13] The continuing vitality and scope of *Fong Foo* is somewhat uncertain in light of this Court's recent decision in *Illinois* v. *Somerville*, 410 U.S. 458.

that an appeal to this Court was not authorized under the old Criminal Appeals Act. After so holding the Court added the following dictum (399 U.S. at 289-290):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States* v. *Ball*, 163 U.S. 662, 671 (1896).

This dictum, however, had little relevance to the case before the Court, since the United States was not seeking "a subsequent prosecution" of Sisson, but merely to have the district court enter a judgment of conviction in accordance with the jury's verdict. The single case cited by the Court, *United States* v. *Ball*, 163 U.S. 662, as we have shown, involved a verdict of acquittal entered by a jury. Moreover, the language in *Sisson*, like the language in *Ball* and *Kepner*, was wholly unnecessary to this Court's decision."

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[14] Tending to confirm our submission that *Sisson* should not be regarded as dispositive of the double jeopardy issue is the plurity opinion in *United States* v. *Jorn*, 400 U.S. 470. As there stated in discussing *Sisson* (400 U.S. at 478, n. 7):

"It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an 'acquittal' for purposes of this Court's jurisdiction over the appeal under 18 U.S.C. § 3731. * * * Of course, as we noted in *Sisson*, *supra*, at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an 'acquittal' for purposes of assessing our jurisdiction to review: the trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *.'"

This language indicates that four members of the Court viewed the holding in *Sisson* solely as one determining "this Court's jurisdiction over the appeal under [the old] 18 U.S.C. 3731." See also the dissenting opinion of Mr. Justice White in *United States* v. *Sisson*, *supra*, 399 U.S. at 328, n. 4 (which was joined by the Chief Justice and Mr. Justice Douglas): "I cannot believe that the majority really means to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation [the present Section 3731]."

It is thus plain that the "thicket" that the majority below perceived as barring an appeal in these circumstances does not contain a single holding of this Court in which the important issue we seek to raise here has been litigated and resolved. Under these circumstances, we submit, this Court should accept the suggestion of the court of appeals that "the dictum in *Ball* that underlay *Kepner*, *Fong Foo* and *Sisson*" be subjected to the kind of "[r]eexamination" that only this Court is competent to undertake (App. A, *infra*, pp. 29a-30a, n. 20).

3. There are presently pending on petitions for writs of certiorari two other cases raising issues closely related to the issue presented here; if certiorari is granted in those cases, it would also be particularly appropriate to consider at the same time the issue raised here.

a. *Serfass* v. *United States*, No. 73-1424, petition for a writ of certiorari filed March 22, 1974, involves what might be described as the other side of the same double jeopardy coin. There, as here, the defendant sought dismissal of an indictment charging him with failure to report for induction. The basis of the motion to dismiss was that the local board improperly failed to reopen his classification when he made a post-induction-order claim for treatment as a conscientious objector. Serfass made his motion prior to trial, and the district court granted it on the basis of the Selective Service File, Serfass' affidavit, and certain stipulations of counsel. The Court of Appeals for the Third Circuit held that an appeal by the United States would not violate the Double Jeopardy Clause because Serfass had not been placed in jeopardy at the time the indictment had been dismissed. On the merits, it reversed the order of the district court and remanded the case for trial.[15]

If, as we believe, the Court of Appeals for the Third Circuit was correct in *Serfass*, it seems hard to reconcile the result in that case with the conclusion reached below. Jenkins, although guilty, will go free, even though the legal error which caused the order of dismissal may be corrected without a second trial. This is apparently so simply because the district court did not rule before trial on his motion for a judgment of acquittal, which was in fact filed prior

[15] The same result was reached by the Court of Appeals for the Second Circuit a few days after its decision in the instant case. *United States* v. *Velazquez*, 490 F. 2d 29.

to trial.[16] Since the success of the motion did not turn on disputed facts, it could as readily have been acted on before trial as after.

On the other hand, Serfass may go to jail, and will at least be subject to a trial in the district court, because he diligently made and pressed his motion prior to trial. Under those circumstances, the consideration of the propriety of the dismissal by the court of appeals could not be characterized under the logic of the *Jenkins* court as a *re*trial (although perhaps, under the reasoning in *Jenkins*, it was a trial).

This result is unacceptable in terms of the policies reflected by the Double Jeopardy Clause, and we respectfully submit that, if certiorari is granted in either case, it should also be granted in the other, so that a rational and just rule may be formulated.[17]

b. In *United States* v. *Wilson*, No. 73-1395, petition for writ of certiorari filed March 15, 1974, the district court entered an order, after a jury verdict of guilty, dismissing an indictment on the ground of

[16] The only possible explanation for the delay in decision is that the district court may have regarded this written motion, filed prior to trial, to have been intended to support the motion to be made after the evidence was heard at trial. This is particularly probable here because the motion was filed along with motions concerning the *voir dire*, requests to charge the jury, and a trial memorandum of law. C.A. App. A-1. (Respondent ultimately waived a jury trial.)

[17] Since there is a square conflict among the courts of appeals regarding the issue raised in *Serfass*, we have filed a memorandum in that case suggesting that the petition for a writ of certiorari be granted.

unnecessary pretrial delay. The Court of Appeals for the Third Circuit held that this order was an acquittal even though it did not go to the merits. Accordingly, relying on the "dictum" in *United States* v. *Ball*, *supra*, which was quoted in *Sisson*, it held that the Double Jeopardy Clause bars an appeal from an acquittal.[18]

Our petition for certiorari in *Wilson* raises two issues. We challenge the characterization of the order of dismissal as an "acquittal," contending that it is unsound as a matter of law and contrary to definition employed by the Court of Appeals for the Second Circuit (in this case and in *United States* v. *Weinstein*, 452 F. 2d 704, certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917) and the Court of Appeals for the Eighth Circuit (in *United States* v. *Whitted*, 454 F. 2d 642). We also argue that, even if the order can be characterized as an acquittal, an appeal is not barred by the Double Jeopardy Clause. Since, if certiorari is granted in *Wilson*, that case could be resolved (on the definition of an "acquittal") without reaching the Double Jeopardy issue raised here, it is respectfully submitted that, if the issue we have presented is deemed worthy of review, the petition here should be granted along with the petition for certiorari in *Wilson*.[19]

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[18] In *Serfass*, the Court of Appeals for the Third Circuit distinguished *Wilson* as involving a "*post-trial* directed verdict of acquittal" (slip op. 5, n. 1) (emphasis in original).

[19] We are sending counsel for respondent copies of our petition for certiorari in *Wilson* and our memorandum in *Serfass*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1973

No. 79

(Argued September 12, 1973

Decided December 11, 1973)

Docket No. 73-1572

UNITED STATES OF AMERICA, APPELLANT

v.

RONALD S. JENKINS, APPELLEE

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges

Appeal by the United States from a judgment of the District Court for the Eastern District of New York, Anthony J. Travia, *Judge*, which, after trial, dismissed an indictment for refusal to submit to induction into the armed forces in violation of 50

U.S.C. App. § 462(a), on the ground that despite the subsequent decision in *Ehlert* v. *United States*, 402 U.S. 99 (1971), defendant was justified in relying on earlier decisions in this circuit requiring the local board to reopen his classification.

Dismissed for lack of appellate jurisdiction.

L. KEVIN SHERIDAN, Assistant United States Attorney (Robert A. Morse, United States Attorney, Eastern District of New York, of Counsel), *for Appellant.*

JAMES S. CARROLL, Esq., New York, N. Y., *for Appellee.*

FRIENDLY, *Circuit Judge:*

This appeal by the United States from a judgment of the District Court for the Eastern District of New York dismissing an indictment after a bench trial is the latest in a growing list of cases showing that the eagerly awaited 1970 amendment of the Criminal Appeals Act, 18 U.S.C. § 3731, 84 Stat. 1890, has not resolved all the problems in this area.[1]

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[1] Although the Supreme Court has applauded the new Act, see *United States* v. *Sisson*, 399 U.S. 267, 307-08, 324-25 (1970); *United States* v. *Weller*, 401 U.S. 254, 255 n.1 (1971), this case and others herein cited show that the amendment has by no means solved all problems in this field.

The statute, so far as here relevant, reads as follows:[2]

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

I.

The indictment here at issue charged that defendant Jenkins, a registrant under the Universal Military Training and Service Act, "knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to submit to induc-

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[2] The statute also directs:

> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The judgment in this case was rendered October 24, 1972, and the Government's notice of appeal was filed on November 21, 1972, but its brief was not filed until June 13, 1973. This scarcely conforms with our notion of diligent prosecution and we would have dismissed the appeal on that ground if defendant had so requested. In *United States* v. *Goldstein*, 479 F.2d 1061, 1064 n.4 (2 Cir. 1973), we admonished that, in appeals under 18 U.S.C. § 3731, the Government's brief should ordinarily be filed within 30 days after the notice of appeal.

tion into the armed forces of the United States, after notice had been given to the defendant by Local Board No. 50, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 24th day of February, 1971," in violation of 50 U.S.C. App. § 462(a).

Jenkins waived trial by jury, and the case was heard by Judge Travia, who later filed an opinion containing findings of fact and conclusions of law. The facts developed at trial were as follows:

After receiving an order to report for induction on February 24, 1971, Jenkins wrote the Local Board asking to be reclassified as a conscientious objector. On the day before his scheduled induction, he went to the draft board and requested Form 150, the conscientious objector application form. In response to his request, a Board representative advised him to draft a brief statement summarizing his beliefs, which he did. The Board then denied his request for postponement of his induction. Jenkins failed to report for induction the next day and subsequently returned his completed Form 150 to the Board.

After extensive discussion, the court concluded that "The indictment in this case is dismissed and the defendant is discharged." Recognizing that in *Ehlert* v. *United States*, 402 U.S. 99, decided on April 21, 1971, the Supreme Court had held that local boards need not consider conscientious objector claims filed by registrants after they receive their induction orders, the judge ruled that *Ehlert* should not be given retroactive effect in this case and that Jenkins' late-

crystallizing conscientious objection claim was a valid defense to the criminal charge under this court's decision in *United States* v. *Geary*, 368 F.2d 144 (2d Cir. 1966), which *Ehlert* disapproved, 402 U.S. at 101 n.3. The Government contends that this ruling is contrary to our recent decision in *United States* v. *Mercado*, 478 F.2d 1108 (2 Cir. 1973), in which we applied *Ehlert* to a registrant with a conscientious objection claim that had allegedly crystallized after notice of induction. Appellee argues that *Mercado* is distinguishable. However, we do not reach that issue since, as we hold, we are without jurisdiction to entertain the Government's appeal.

II.

Appellant asserts, and appellee does not dispute, that Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set at rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91-1296, at 4-13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal. To determine that question, we must look not merely to the familiar but unilluminating words of the Double Jeopardy clause, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," but also to its historical background, the proceedings leading to its

adoption as part of the Fifth Amendment, and the course of decisions thereunder.

While the precise origin of the protection against double jeopardy is unclear, it is certain that the notion is very old.[3] The Greeks apparently treated the concept as part of a primitive form of *res judicata*. In 355 B.C., Demosthenes stated, "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort." 1 *Demosthenes* 589 (Vance trans 1962). Justinian's *Corpus Juris Civilis* recognized the special applicability of the principle to criminal proceedings through the maxim that "the governor should not permit the same person to be again accused of crime of which he has been acquitted." 11 Scott, The Civil Law 17 (1932).[4] Similarly, canon law early declared that "there shall not rise up a double affliction," a precept which was ap-

[3] Justice Black characterized the "[f]ear and abhorrence of governmental power to try people twice for the same conduct" as "one of the oldest ideas in western civilization." *Bartkus* v. *Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting). A nineteenth century commentator went even further, asserting that "the principle is a part of that universal law of reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.'" Bachelder, *Former Jeopardy*, 17 Am. L. Rev. 748 (1883).

[4] Under Roman law the judgment upon an action between a defendant and his accuser was apparently not binding against a second accuser who was not a party to the first action, or at least who was not aware that the first prosecution was being brought. 21 Scott, *supra*, at 17-18.

parently based on the notion that God does not punish twice for the same offense. *Bartkus* v. *Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting). The related principle that clerics could not be punished in the king's court after having been tried under canon law was a major source of the dispute between Becket and Henry II; Becket ultimately prevailed, albeit postumously. 1 Pollock and Maitland, A History of English Law 448-49 (2d ed. 1899). In the thirteenth century, as Bracton reports, the bar against multiple prosecutions assumed a rather grim urgency. Since many criminal offenses were tried by battle between the wronged party and the alleged offender, it was evident that a series of prosecutions would ultimately produce a "conviction" against all but the hardiest combatants, if enough "appealors" were willing to try their hands at the case. Once the defendant had endured one such trial for "one deed and one wound," Bracton wrote, "he will depart quit against all, also as regards the king's suit, because he thereby proves his innocence against all, as though he had put himself on the country and it had exonerated his completely." 2 Bracton, On the Laws and Customs of England 391 (Thorne trans. 1968).[5]

[5] Bracton's generous view of the emerging double jeopardy protection was not shared by his immediate successors. During the thirteenth and fourteenth centuries, a defendant's success in the quasi-criminal action of "appeal" lost its preclusive effect against a subsequent suit by the king, and *vice versa*, although success on an appeal would still bar a second appeal, and success on an indictment would bar a second

By the time of Lord Coke, the nascent double jeopardy concept had begun to mature into a complex of common law pleas, the most prominent of which were *autrefois acquit* and *autrefois convict*. The first, according to Coke, provided that a defendant could block a second trial by proving that he had previously been acquitted of the same offense. Similarly, under *autrefois convict* a defendant could plead a former conviction in bar of a second indictment for the same crime. See 3 Coke, Institutes of the Laws of England 213-14 (1797 ed.); 2 Hale, Pleas of the Crown 240-54 (Dougherty ed. 1800). Reprosecution after an acquittal was permitted, however, if the first indictment erroneously failed to charge an offense. In *Vaux's Case*, 4 Coke 44, 76 Eng. Rep. 992 (Q.B. 1591), it was held that if the first indictment was deficient for failure to charge all the elements of the felony and a second indictment was brought for the same offense, a plea of *autrefois acquit* would be bad even though the acquittal had not resulted from an objection to the indictment. A different rule applied in the case of an error of law committed by the court in the course of the trial. Even if the lower court's

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prosecution by the crown. See 1 Britton 104 (Nicholas trans. 1865); Thayer, A Preliminary Treatise on Evidence at the Common Law 158-59, 161 (1898).

By the fifteenth century, however, an acquittal on an appeal, at least after trial by jury, once again generally barred suit by the king, and an acquittal on an indictment could be pleaded as a bar to a subsequent appeal. Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. Pa. L. Rev. 602, 607 (1934); Friedland, Double Jeopardy 9 (1969).

error was egregious, such as a mistaken direction by the judge that the felony was not committed on the day named in the indictment, or an erroneous determination that the conduct alleged and proved did not constitute a felony, the defendant could plead *authefois acquit* to a second indictment.

Blackstone's careful classification of the various common law pleas in bar indicates that by the late eighteenth century, the status of the double jeopardy protection was well settled. The four pleas in bar, according to Blackstone, were *autrefoits acquit*, *autrefoits convict*, *autrefoits attaint* (former attaint, founded on the reasoning that "a second prosecution cannot be to any purpose, for the prisoner is dead in law by the first attainder"), and pardon. In terms that plainly anticipated the Fifth Amendment's language, Blackstone described it as a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 Blackstone, Commentaries of the Laws of England 335-36 (Sharswood ed. 1873). As in the time of Coke, the protection was afforded only if the defendant could legally have been convicted on the first indictment. 4 Blackstone, supra, 335 n.5 (Chitty).

In two critical respects, however, the law changed between the seventeenth and eighteenth centuries. In 1660, the King's Bench disapproved earlier cases that had permitted the crown to seek a new trial after an acquittal. *Rex* v. *Read*, 1 Lev. 9, 83 Eng. Rep. 271 (K.B. 1660). Although the ruling was made over the

dissent of a well-respected judge, the court stuck to its position with increasing confidence in later cases. See, *e.g.*, *Rex* v. *Jackson*, 1 Lev. 124, 83 Eng. Rep. 330 (K.B. 1661); *Rex* v. *Fenwick & Holt*, 1 Sid. 149, 153, 82 Eng. Rep. 1025, 1027 (1663). See also 21 Viner, A General Abridgement of Law and Equity 478-79 (1793).[6] By the time of Blackstone, it appears that although the king was theoretically permitted to bring a writ of error when the error appeared on the face of the record, Friedland, Double Jeopary 287 (1969), the prosecution could not be granted a new trial unless the defendant had obtained his acquittal by fraud or treachery. See 2 Hawkins, Pleas of the Crown, ch. 35 § 8; ch. 47 § 12; ch. 50 § 10 (6th ed. 1788); 1 Chitty, The Criminal Law 657,

[6] Sir Matthew Hale contributed to the confusion over whether the king could have a new trial after an acquittal, since in his influential treatise he assumed that it was possible. For gross errors of law in the trial court, Hale commented that the king could seek reversal by writ of error and then indict the defendant *de novo*. He urged that in such a case, the appellate court should not simply enter a conviction, but should grant the defendant a new trial, "for possibly he hath other matter for his defense." 2 Hale, Pleas of the Crown 247 (Dougherty ed. 1800).

By 1691, however, the court of King's Bench had apparently forgotten both Hale's prescription and its own earlier inconstancy, for in *Rex* v. *Davis*, 1 Shower 336, 89 Eng. Rep. 609 (K.B. 1691), the reporter wrote that "a new trial was denied, for that the Court said, there could be no precedent shown for it in case of acquittal." By 1776, defense counsel could assert confidently, "whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops." *Duchess of Kingston's Case*, 20 Howell, State Trials 355, 528 (1776).

747 (Am. ed. 1836); 4 Stephen, New Commentaries on the Laws of England 456 (1845 ed.). See also *United States* v. *Sanges*, 144 U.S. 310, 312 (1892).[7] During the same period, defendants gradually won broader rights to appeal from a conviction. Through the 1660's, the court of King's Bench refused to grant defendants the right to a new trial upon proof of error in the first, *Rex* v. *Lewin*, 2 Keble, 396, 84 Eng. Rep. 248 (K.B. 1663); *Rex* v. *Marchant*, 2 Keble 403, 84 Eng. Rep. 253 (K.B. 1663), but in the next decade the court reversed its stance and decided that a defendant could have a new trial in at least some circumstances. *Rex* v. *Latham & Collins*, 3 Keble 143, 84 Eng. Rep. 642 (K.B. 1673); *Rex* v. *Cornelius*, 3 Keble 525, 84 Eng. Rep. 858 (K.B. 1675). Nonetheless, there were still strict limitations on defendants' appeal rights. Even in the eighteenth century, in capital cases the defendant's writ of error could not be taken without the king's permission. See *Rex* v. *Wilkes*, 4 Burr. 2527, 2551, 98 Eng. Rep. 327, 340 (K.B. 1770); *The Ailsbury Case (Anonymous)*, 1 Salk, 264, 91 Eng. Rep. 232 (K.B. 1699). *Cf. United States* v. *Gilbert*, 25 F. Cas. 1287 (No. 15,204) (C.C.D. Mass. 1834 (Story, J.). Chitty noted that the court could grant a new trial after defendant brought a writ of error, "Not on the merits, but only for ir-

[7] Even the exception for fraud and treachery was somewhat doubtful. The text writers regularly recited the exception as the preferable rule, but Friedland reports that in only one case was the exception actually applied to overturn an acquittal. Friedland, Double Jeopardy 286 & n.4 (1969).

regularity in the proceedings." 1 Chitty, *supra*, at 654. In misdemeanor cases the writ of error was discretionary with the court, but by the end of the eighteenth century, as Stephen observed, a writ of error could be brought "for notorious mistakes in the judgment or other parts of the record." He added that if the defendant won a reversal, "he remains liable to another prosecution for the same offense; for the first being erroneous, he never was in jeopardy thereby." 4 Stephen, New Commentaries on the Laws of England 456-58 (1845 ed.).

Although the documentary history of the Double Jeopardy clause is scanty, the available evidence suggests that the draftsmen of the Bill of Rights intended to import into the Constitution the common law protections much as they were described by Blackstone. Madison's first version of the clause, which he introduced in the House of Representatives on June 8, 1789, read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." 1 Annals of Congress 434 (1789).[8] In the course of the debate in the House over the proposed amendments, Representative Benson argued against Madison's language on the ground that its meaning appeared "rather doubtful." Benson presumed that the amendment "was intended

[8] This language, which rather clearly would have prevented a government appeal that would require a new trial, may have stemmed from Maryland's proposal that in criminal cases "there be no appeal from matter of fact, or second trial after acquittal." 2 B. Schwartz, The Bill of Rights: A Documentary History 732 (1971).

to convey what was formerly the law, that no man's life should be more than once put in jeopardy for the same offense." Yet it was well known, he insisted, that a defendant was entitled to more than one trial, upon reversal of his original conviction. Representative Sherman agreed, adding that the amendment as it stood might appear to prevent a defendant from suing out a writ of error in his own behalf. In defense of Madison's proposal, Representative Livermore stated that the clause was in fact declaratory of law as it stood, and suggested that making any changes would risk giving the impression that Congress intended to change the law by implication. 1 Annals of Congress 753 (Aug. 17, 1789).

The Senate rejected Madison's language in favor of the more traditional common law expression, employing the term "jeopardy," rather than specifying "more than one punishment or one trial."[9] Although the report of the Senate debates is unenlighteningly perfunctory, the Senate's choice of language that closely tracked the traditional characterization strongly suggests that the Senate intended to ensure that the

[9] The Senate's language may have derived largely from the proposed amendment offered by the New York Ratifying Convention, which read in part, "That no person ought to be put twice in jeopardy of Life or Limb for one and the same offence." 2 B. Schwartz, *supra*, at 912.

The language also closely tracked the common law formulation as it was understood at the time. In 1788, for example, a Pennsylvania court recited, "by the law it is declared that no man shall twice be put in jeopardy for the same offense." *Respublica* v. *Shaffer*, 1 Dall. 236, 237 (Phil. Oyer & Term. 1788).

Double Jeopardy clause incorporated the protections for defendants that the common law had come to provide—neither more nor less.[10] The history may leave it open to argue that the framers did not regard the crown's inability to appeal an acquittal after a trial on the merits as part of the common law concept of double jeopardy but rather as an independent principle, to be followed for a century but not incorporated in the clause, although the general flavor of the debate, especially the emphasis on the defendant's right to a retrial, is somewhat to the contrary. However, any uncertainty as to the disposition of this case is resolved, as far as we are concerned, by Supreme Court decisions, to which we now turn.

III.

In its first century, the Double Jeopardy clause posed relatively few difficulties for the Supreme

[10] The case law in the thirteen original states at the time the Bill of Rights was drafted gives some further insight into the dimensions of the common law protection the drafters thought they were building into the Fifth Amendment. The few reported cases touching on the problem of appeals in criminal cases generally stated or appeared to assume that the prosecution could not appeal from an acquittal, even though the defendant under the proper circumstances could appeal from his conviction. See *Hannaball* v. *Spalding*, 1 Root 86 (Conn. 1789); *Coit* v. *Geer*, v *Kirby* 269 (Conn. 1787); *Steel* v. *Roach*, 1 Bay's R. 61 (S.C. 1788). *Contra*, *State* v. *Hadock*, 2 Haywood 162 (N.C. 1802), overruled in *State* v. *Jones*, 1 Murphy 257 (N.C. 1809). Later cases demonstrate that during the nineteenth century, the rule became practically universal that the state could not appeal from an acquittal. See *United States* v. *Sanges*, 144 U.S. 310 (1892).

Court. The problems that did arise, such as reprosecution after a mistrial, *United States* v. *Perez*, 9 Wheat. (22 U.S.) 579 (1824), multiple punishment on a single verdict, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and consecutive prosecutions by different sovereigns for the same conduct, *Moore* v. *Illinois*, 55 U.S. (14 How.) 13 (1852), were familiar to the English courts, and in applying the clause the Supreme Court relied heavily on the common law analysis.

The problem of government appeals did not reach the Supreme Court until *United States* v. *Sanges*, 144 U.S. 310 (1892). In that case, the Court carefully reviewed the common law authorities in England and in many states and concluded that in the absence of an express enabling statute, the Government could not bring an appeal in a criminal case from any adverse determination below, whether the decision in the trial court was based on a question of fact or of law. Although some of the state cases went on grounds of double jeopardy, the Court neither adopted nor rejected this ground of decision. Rather it left open whether and under what circumstances a federal statute authorizing appeal by the Government from an acquittal would pass constitutional muster.

Kepner v. *United States*, 195 U.S. 100 (1905), squarely presented the question whether a provision against double jeopardy, there embodied in an act for the government of the Philippines, 32 Stat. 691, 692 (1902), prevented an appeal by the Government after an acquittal at trial. Kepner, a Philippine at-

torney, had been acquitted of the charge of embezzlement after trial to the court. The Government appealed to the Supreme Court of the Philippines, pursuant to local custom; that court reversed the acquittal, found Kepner guilty, and sentenced him. A sharply divided Supreme Court reversed the conviction and held that an acquittal in the trial court absolutely barred government review by appeal, and that under the Double Jeopardy clause this would be true in the United States even if a statute purported to grant the Governmental appeal rights. Mr. Justice Day, writing for five Justices, quoted at length from *United States* v. *Ball*, 163 U.S. 662 (1896), where the Court, refusing to follow *Vaux's Case*, *supra*, had held that the Government could not bring *a new prosecution* after the defendant had been acquitted of the same offense under a defective indictment which he had not challenged. Although the problem of appeal is obviously distinct from that of a second prosecution, the Court relied, 195 U.S. at 129-30, on a dictum from *Ball* saying, 163 U.S. at 671 "The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." Mr. Justice Holmes, joined by two other Justices,[11] filed a vigorous dis-

[11] The ninth Justice, also dissenting, apparently would have agreed with the majority if the case had arisen in a federal court within the United States but believed that the Act of Congress was not intended to change the previous Philippine practice whereby "the jeopardy did not terminate, if appeal were taken to the audiencia or Supreme Court, until that body had acted upon the case." 195 U.S. at 137.

sent. Relying heavily on the defendant's right to secure a new trial on appeal from a conviction, he argued that "logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause." 195 U.S. at 134.

Two years later, as a result of unrelated developments, Congress passed the first Criminal Appeals Act, 34 Stat. 1246 (1907). The new statute allowed the United States to appeal from a district or circuit court to the Supreme Court in three categories of cases:

> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea at bar, when the defendant has not been put in jeopardy.

The first category clearly presented no constitutional problem since it dealt with cases where a defendant

had not yet been put in jeopardy,[12] as Mr. Justice Holmes was quick to point out in *United States* v. *McDonald*, 207 U.S. 120, 127 (1907). The third category also created no difficulty since it was expressly limited to cases where "the defendant has not been put in jeopardy," see *United States* v. *Sisson*, *supra*, 399 U.S. at 304-07. The second category did not offend the principle that a defendant acquitted by the trier of fact could not be prosecuted again; it related only to a case where the defendant had been convicted and the judge later ruled he should not have been tried at all. The same analysis applies to the Act of May 9, 1942, 56 Stat. 271, authorizing an appeal to the courts of appeals from a decision or judgment "quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof," or from a decision arresting a judgment of conviction, except, in either case, where a direct appeal could be taken to the Supreme Court. Although the 1948 amendment, 62 Stat. 844, altered the wording somewhat, the courts avoided any potential difficulties by construing

[12] The general rule is that jeopardy attaches when the jury is selected and sworn or, in a bench trial, when the judge begins to hear evidence. *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949); *Green* v. *United States*, 355 U.S. 184, 188 (1957); *United States* v. *Jorn*, 400 U.S. 470, 479 (1971); *McCarthy* v. *Zerbst*, 85 F.2d 640, 642 (10 Cir.), *cert. denied*, 299 U.S. 610 (1936). The conclusion that jeopardy attaches when the trial commences, Justice Harlan pointed out in *United States* v. *John*, *supra*, "expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." 400 U.S. at 480.

the Act, not according to what the revisers had written, but according to the interpretation that had been given the prior statutory language. See *United States* v. *DiStefano*, 464 F.2d 845, 847-48 (2 Cir. 1972); *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (9 Cir. 1958). Since the United States could not appeal at all prior to the Criminal Appeals Act of 1907 and since that statute did not permit appeals after acquittals on the merits, the dearth of federal authority on the problem before us is not surprising.[13]

[13] The states have adopted a wide variety of schemes concerning appeals by the prosecution, a few permitting appeal from an acquittal, some permitting appeal in certain classes of cases or from certain trial court orders, and some permitting no appeal whatsoever. See Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1927); Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960). Connecticut, Vermont and Wisconsin have all enacted statutes permitting the state to appeal from acquittals, Conn. Gen. Stat. Ann. § 54-96 (Supp. 1973); Vt. Stat. Ann. tit. 13 § 7403 (1958); Wis. Stat. Ann. § 974.05(1)(e) (1971), repealed, 1971 Laws, ch. 298 § 25. In each case, however, the state's appeal has been strictly limited to errors of law and further cabined by rigid procedural restrictions. As a result, the state has made sparing use of its appeal rights in these three jurisdictions, and the courts have experienced little difficulty in distinguishing findings of fact, which are immune from review, and determinations of law, which can be appealed. See, *e.g.*, *State* v. *Dennis*, 150 Conn. 245, 188 A.2d 65 (1963) (erroneous instruction); *State* v. *Ballou*, 127 Vt. 1, 238 A.2d 658 (1968) (erroneous direction of acquittal); *State* v. *Stang Tank Lines*, 264 Wis. 570, 59 N.W.2d 800 (1953) (suspension of fine held outside trial court's discretion).

Although the Wisconsin constitution contains a double jeopardy clause, the state supreme court upheld the government appeal statute, expressly relying on Justice Holmes' rea-

The first Supreme Court decision after *Kepner* that is of real relevance is *Fong Foo* v. *United States*, 389 U.S. 141 (1962). In what promised to be a long criminal trial, three government witnesses had testified and a fourth was in the process of doing so when the district judge directed the jury to return verdicts of acquittal,[14] and then entered a formal judgment of acquittal as to all defendants. The judge acted because of what he considered a lack of credibility in the government's initial witnesses and improper conduct by the prosecutor. Considering the trial court's action to have been a usurpation of judicial power, the court of appeals issued mandamus requiring that the judgment of acquittal be vacated. It held that since the judge lacked power to direct the acquittal, the judgment was void and would not support a plea of *autrefois acquit*.[15] The Supreme Court reversed in a brief *per curiam* opinion, relying on the same dictum

soning in his dissent in *Kepner*. *State* v. *Witte*, 243 Wis. 423, 431, 10 N.W.2d 117, 120 (1943). The Wisconsin provision was repealed two years ago in recognition of the Supreme Court's decision in *Benton* v. *Maryland*, 395 U.S. 784 (1969), which held the Double Jeopardy clause binding on the states.

[14] The judge announced to the defendants, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free." *In re United States*, 286 F.2d 556, 560 (1 Cir. 1961).

[15] Judge Aldrich concurred on the basis that he was certain that the judge had acted solely because of an erroneous view of improper prosecutorial conduct; if the judge had directed acquittal because of his belief, however erroneous, in the lack of credibility of the government witnesses, Judge Aldrich wrote, he would not have been guilty of a usurpation of power, 286 F.2d at 565.

from *Ball* that had formed the basis of *Kepner*. The Court said, 369 U.S. 141, 143 (1962):

> The petitioners were tried under a valid indictment in a federal court which had jurisdiction over them and over the subject matter. The trial did not terminate prior to the entry of judgment . . . . It terminated with the entry of a final judgment of acquittal as to each petitioner. The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, "[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution."

The only later Supreme Court decision directly relevant to our problem is *United States* v. *Sisson*, 399 U.S. 267 (1970). Sisson, like Jenkins, had been charged in a standard indictment with violating 50 U.S.C. App. § 464(a) by failing to obey an order to submit to induction. After the judge had denied various motions to dismiss the indictment, the case went to a rather confused trial. Although Sisson offered some testimony that might be deemed relevant to a claim of conscientious objection, 399 U.S. at 274-75, the case was submitted to the jury on the issue whether Sisson's refusal to submit to induction was wilful. The jury brought in a guilty verdict. The defendant thereupon moved to arrest the judgment, F.R.Cr.P. 34, on the ground that because of the alleged illegality of the Vietnam war, the court lacked jurisdiction. Not passing on this claim, the court pur-

ported to "arrest judgment" on the ground that Sisson had satisfied the court that he had genuine moral objections to combat service in Vietnam and that to compel him to render such service would violate the Free Exercise provision of the First Amendment and the Due Process Clause of the Fifth. The court ruled also that § 6(j) of the Selective Service Act, 50 U.S.C. App. § 456(j), violated the Establishment Clause.[16] In an opinion by Mr. Justice Harlan, the Supreme Court dismissed the Government's appeal for want of jurisdiction.

Much of Justice Harlan's opinion was devoted to demonstrating that, despite its language, the district court's order was not in fact one "arresting a judgment of conviction for insufficiency of the indictment or information where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded," the language of § 3731 at that time. This conclusion rested on two bases: (1) "that a judgment can be arrested only on the basis of error appearing on the 'face of the record,' and not on the basis of proof offered at trial," 399 U.S. at 281; and (2) that the court's adverse decision was not for insufficiency of the indictment, 399 U.S. at 287-88. If the opinion had stopped there, it would have little bearing on the instant case. But it did not, and for an important reason—the portion of the opinion up to that point had the assent of only four members of the Court.

[16] The district court's views were later held to be erroneous, *Gillette* v. *United States*, 401 U.S. 437 (1971).

There followed slightly over two pages in which alone Justice Harlan wrote for a majority, 399 U.S. at 288-90. These began by saying:

> The same reason underlying our conclusion that this was not a decision arresting judgment —i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

The Justice then propounded a hypothetical case similar to *Sisson* except that the trial judge instructed the jury to acquit if they made the same factual findings that the court in *Sisson* had reached in its post-trial opinion. If the jury had then acquitted, Justice Harlan wrote, there could be "no doubt that its verdict of acquittal could not be appealed under § 3731 *no matter how erroneous the constitutional theory underlying the instructions*," 399 U.S. at 289 (emphasis in original). This was followed by a quotation from the remarks of Senator Knox concerning the bill that was to become the Criminal Appeals Act, 41 Cong. Rec. 2752, saying, *inter alia:*

> The Government takes the risks of all the mistakes of its prosecuting officers *and of the trial judge in the trial*, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial. (Emphasis in original).

It would still be arguable that all this was directed to the issue of construction of the Criminal Appeals Act. But the Justice then said:

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," United States v. Ball, 163 U.S. 662, 671 (1896).

In a footnote to that passage, Justice Harlan added: "This principle would dictate that after this jurisdictional dismissal, Sisson may not be retried." *Id.* at 289-90 & n. 18. The passage quoted from *Ball* was the very one that Mr. Justice Day had cited in *Kepner* for the proposition that the Double Jeopardy clause prohibited an appeal by the Government after acquittal in a criminal case and that the Court had again relied on in *Fong Foo*.

The Justice then disposed of three differences between his hypothetical and the *Sisson* case. Two of these are relevant here. It made no difference that "in this case it was the judge—not the jury—who made the factual determinations," since "judges, like juries, can acquit defendants," 399 U.S. at 290. It was likewise inconsequential that the judge had labeled his characterization an arrest of judgment rather than a post-verdict acquittal; what was important was what the judge did, not what he said.

These pages of the *Sisson* opinion seem to us to be dispositive of the instant case. In essence the judge's post-trial ruling in *Sisson* had made the jury trial a nullity and had resulted in a trial to the judge, who had rendered a judgment of acquittal on the merits. Even though this action was based on an erroneous legal ground, the Double Jeopardy clause prevented a new trial.[17] Indeed, we have already interpreted *Fong Foo* and *Sisson* to mean precisely this. *United States* v. *Weinstein*, 452 F.2d 704, 709 (2 Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).[18]

Although the district judge here characterized his action as a dismissal, it is clear from the analysis in *Sisson* that for double jeopardy purposes he acquitted

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[17] We see nothing in Justice Harlan's treatment of *United States* v. *Covington*, 395 U.S. 57 (1969), in footnotes 19 and 56 of his opinion, to alter this conclusion. The decisive distinction was that in *Covington* the district court had dismissed an indictment *before trial* for insufficiency, without an evidentiary hearing or any need for one. The same was true in *United States* v. *Boston & Maine R.R.*, 380 U.S. 157 (1965), upon which the dissent relies. See also *United States* v. *Pecora*, No. 72-2173 (3 Cir. Aug. 31, 1973), slip op. at 7; *United States* v. *Martin Linen Supply*, No. 72-2796 (5 Cir. Oct. 9, 1973), slip op. at 9.

[18] We are unable to understand what comfort the Government derives from that decision, where we vacated an order dismissing an indictment subsequent to a judgment of conviction as beyond the judge's power. Distinguishing *Fong Foo*, we said, 452 F.2d at 711 n.10:

> There is no similar problem here. Vacating the order dismissing the indictment would simply leave the judgment of conviction unimpaired, subject to whatever remedies Grunberger may have with respect to it.

Jenkins has been *acquitted*, even if erroneously so.

the defendant. His ruling was based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case. The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in *Ehlert* should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in *Ehlert*, and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact.

Other courts of appeals have followed a similar course of inquiry in determining whether a trial court's ruling should be deemed an acquittal. In *United States* v. *McFadden*, 462 F.2d 484 (9 Cir. 1972), the court considered a limited conscientious objection claim very similar to the one at issue in *Sisson*. Finding that the trial court had dismissed the indictment on the basis of evidence introduced at the trial, the Ninth Circuit held that the court had acquitted the defendant, and that he could not be retried. By contrast, the Seventh Circuit recently rejected a claim that an arrest of judgment constituted an acquittal. *United States* v. *Esposito*, No. 71 CR 980 (7 Cir. June 12, 1973), *petition for cert. filed*, 42 U.S.L.W. 3137 (Sept. 6, 1973). The trial court in *Esposito*

had held that the offense of illegal possession and distribution of cocaine was "not one which Congress has power to prohibit in the manner attempted by 21 U.S.C. § 841." On appeal, the court held that the trial judge's decision had not been based on facts adduced at trial, but solely on his opinion that the statute was unconstitutional. The court wrote, slip opinion page 4, that

> it is clear from the order that the court concluded that the fatal defect in the prosecution lay in the indictment's failure to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. The fact that the prosecution failed to prove such a connection though alluded to in the order, was of no significance to the actual basis for the decision.[19]

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[19] We have no occasion to consider the correctness of decisions that have extended this analysis to pre-trial rulings. In *United States* v. *Ponto*, 454 F.2d 657 (7 Cir. 1971) (*en banc*), a sharply divided court held that the Government could not appeal from a pre-trial dismissal granted because the judge felt that the circumstances of the case required that the defendant's selective service classification should have been reopened. See also *United States* v. *McCreery*, 473 F.2d 1381 (7 Cir. 1973); *United States* v. *Southern Ry.*, No. 72-1794 (4 Cir. Oct. 15, 1973). Similarly, in *United States* v. *Rothfelder*, 474 F.2d 606 (6 Cir.), *cert. denied*, 41 U.S.L.W. 3673 (U.S. June 25, 1973), the court held that the Government could not appeal from a pre-trial order dismissing an indictment when the trial court had made its ruling on the basis of information in the defendant's selective service file rather than simply on the basis of the sufficiency of the indictment. See also *United States* v. *Hill*, 473 F.2d 759, 761 (9 Cir. 1972) (court's pre-trial determination that materials were

The Government argues that a reversal here would not require Jenkins to undergo the burden of a second trial, since the judge would simply be directed to alter his erroneous conclusions of law with respect to the non-retroactivity of *Ehlert* v. *United States*, 402 U.S. 99 (1971), in light of our decision in *United States* v. *Mercado*, 478 F.2d 1108 (2 Cir. 1973), and Jenkins' only vexation would lie in being convicted rather than acquitted. We are not certain the matter is quite that simple since in *Mercado* we recognized the possibility of a successful defense by "a registrant who in fact reasonably relied in good faith on the case law or upon the knowledge that local boards in this circuit would consider a belated conscientious objection claim," 478 F.2d at 1111. But apart from that, the absence of need for a second trial would not distinguish *Sisson*. As Mr. Justice White pointed out in dissent, a reversal there on the basis that the trial judge's legal theory was incorrect would simply have meant that "the jury's verdict of guilty—with judgment no longer 'arrested'—simply remains in effect." 399 U.S. at 329. Furthermore, although what we must decide is the case before us, the Government has sought a ruling limited to bench trials where an acquittal plea can be traced to a demonstrable error of law and no further evidentiary hearing is needed. It asserts that the amended Criminal Appeals Act entitles it to appeal every acquittal which can be demonstrated to be the result

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not obscene amounts to a ruling that the defendants were not guilty and thus barred appeal).

of an error of law by the judge. Boldly facing up to its problems, the Government contends that the Double Jeopardy clause should be read to permit a retrial even on an erroneous instruction, a position Justice Harlan rejected out-of-hand in *Sisson*, 399 U.S. at 289. We think that, so long as *Kepner* and *Sisson* stand, the clause forbids a retrial whenever the trier of the facts has rendered a legal determination of innocence "on the basis of facts adduced at the trial relating to the general issue of the case." 399 U.S. at 290 n.19.

The short of the matter is this: *Kepner* held that an acquittal on the general issue barred an appellate court from entering a judgment of conviction on appeal. Since under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy clause protects only against the vexation of a second trial. *Fong Foo* held that a directed acquittal barred a retrial even when it was plain that the acquittal was occasioned by clear error of the judge. *Sisson* held that when a guilty verdict had been nullified by a judge's decision to acquit on the merits, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction. We cannot see how in the circumstances here presented the Government can thread a way through this thicket so long as these decisions stand.[20]

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[20] Reexamination of the dictum in *Ball* that underlay *Kepner*, *Fong Foo* and *Sisson* may well be desirable, particularly now that the Double Jeopardy clause has been extended to the

We add a final word to make clear what we have *not* decided. We are not dealing with appeals by the Government before jeopardy has attached, see fn. 12, as in *United States* v. *Crutch*, 461 F.2d 1200 (2 Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Castellanos*, 478 F.2d 749 (2d Cir. 1973); and *United States* v. *Goldstein*, 479 F.2d 1061 (2 Cir. 1973). We likewise are not dealing with cases where a trial is aborted after jeopardy has attached but before a conclusion of innocence or guilt, of which *Illinois* v. *Somerville*, 410 U.S. 458 (1973), is the latest in a long line of Supreme Court decisions reaching back to *United States* v. *Perez*, 9 Wheat. (22 U.S.) 519 (1824). Finally, we are not dealing with a case, such as that cited in the Senate Report, *supra*, at 12, where the defense postponed until after the swearing of a jury a motion to dismiss an indictment which could as well have been made before, or with the problem presented by the decisions cited in footnote 19. We hold that when a defendant has been

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states. *Benton* v. *Maryland*, 395 U.S. 784 (1969). Mr. Justice Cardozo, writing for an 8-man majority in *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937), remarked "how much was to be said" for the *Kepner* dissent. See also Mayers and Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 8-15 (1960); Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1927). Any such reexamination would also have to take account of the principle of implied acquittal developed in *Green* v. *United States*, 355 U.S. 184 (1957), and *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (2 Cir. 1965) (Marshall, *J.*), *cert. denied*, 383 U.S. 913 (1966). But this is far beyond our power as an inferior court.

acquitted after trial on the merits, the Government cannot appeal from the judgment, even for an allegedly demonstrable error of law by the judge, so long as the Supreme Court adheres to the dictum in *Ball* and the decisions in *Kepner* and *Sisson*.

The appeal is dismissed for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further prosecution.

LUMBARD, *Circuit Judge* (dissenting):

After a trial before Judge Travia without a jury in the Eastern District of New York, the indictment charging Ronald Jenkins with violating 50 U.S.C. App. § 462(a) for failure to comply with an order to submit to induction into the armed forces was dismissed. In dismissing the indictment and discharging the defendant, Judge Travia concluded that the law had not been violated since Jenkins was not required to report for induction while his post-induction notice request for reclassification as a conscientious objector was still pending. On appeal, the government argued that Judge Travia's interpretation of the controlling law was clearly erroneous. Without actually deciding this issue, the majority of this panel now holds that the government has no right to appeal, since to permit it to do so would be to put the defendant in double jeopardy.

For two reasons, I am unable to join the majority in concluding that the government's appeal is barred in the present case by the Double Jeopardy Clause.

First, I believe that Judge Travia's decision was precisely what he termed it, a dismissal of the indictment, an order from which a government appeal is not barred, when, as here, the dismissal is based on a construction of the statute upon which the indictment is founded. 18 U.S.C. § 3731.[1] Second, it is my firm belief that the majority's inflexible application of the Double Jeopardy Clause unnecessarily frustrates the fair administration of criminal justice.

With regard to the first of these points, it is, of course, true, that Judge Travia's characterization of his decision as a dismissal of an indictment does not conclusively make it that for purposes of determining the government's right to appeal.[2] If his decision

[1] 18 U.S.C. § 3731 provides that:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The present version of § 3731, except for eliminating the government's right to appeal directly to the Supreme Court from the decision of a district court, in all other respects leaves intact the right to appeal which the government had under the former version of the statute. *See* p. 700 *supra*. Under that former version the government could appeal from a decision dismissing an indictment "where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

[2] As *United States* v. *Sisson*, 399 U.S. 267, 280 (1970), makes clear, the appellate court must look behind the label used by the trial judge to determine the true nature of his decision.

should more accurately have been described as an acquittal, then the Double Jeopardy Clause would prohibit this appeal. On the other hand, if Judge Travia's characterization is proper, then there is no obstacle to further government prosecution of this case.[3]

In determining the underlying identity of the trial judge's decision, we should first consider *United States* v. *Sisson*, 399 U.S. 267 (1970). That case also involved a refusal to submit to induction on the basis of a claim for conscientious objector status. After a trial and a jury verdict of guilty, District Judge Wyzanski stated that the indictment against Sisson failed to "charge an offense." Based on the evidence adduced at trial, and in particular, the demeanor of the defendant, the judge concluded that Sisson was a "sincerely conscientious man" and that because of his genuine interest in not killing, the Free Exercise and Due Process Clauses prohibited application of the 1967 draft act to him. Accordingly, he granted the defendant's motion for an arrest of judgment.

Appealing directly to the Supreme Court,[4] the government claimed that the Court had jurisdiction un-

[3] The rationale for this distinction in treatment of acquittals and dismissals of indictments arises from the fact that a dismissal based upon the invalidity or construction of the statute on which the indictment was founded was not considered to have placed the defendant in jeopardy, since it was not a determination on the merits of the case. M. Friedland, Double Jeopardy 63 & 63 n.1 (1969).

[4] Former 18 U.S.C. § 3731, under which the appeal in *Sisson* was brought, permitted a direct appeal to the Supreme Court

der the "arresting judgment" provision of the Criminal Appeals Act, 18 U.S.C. § 3731. The Supreme Court, however, refused to hear the appeal, maintaining that the district judge's decision, although designated by him an "arrest of judgment," was, in fact, an acquittal, which was unappealable by the government under § 3731. In addition the Court reasoned that being an acquittal, the appeal by the government was further barred by the Double Jeopardy Clause.

In concluding that Judge Wyzanski's decision had not been an arrest of judgment, but rather an acquittal, the Court emphasized that the disposition of the case had been "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial," especially the demeanor of the defendant. The Court made clear, however, that had the district judge granted the motion instead "on the face of the record," that is, on the basis that the indictment failed to charge any violation of the law, the ruling could have been regarded as an arrest of judgment and the government

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by the government from a decision arresting a judgment of conviction as well as one dismissing an indictment, "where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded." The present version of § 3731, under which the government seeks to appeal in *Jenkins* no longer permits direct appeal to the Supreme Court from the district court's decision. However, as has been noted, in all other respects it leaves intact the government right to appeal. *See* p. 700 *supra*.

would have been permitted to appeal. *See, e.g., United States* v. *Bramblett*, 348 U.S. 503 (1955).

Just as a genuine arrest of judgment would have permitted a government appeal in *Sisson*, under § 3731, so, too, that statute would have allowed an appeal from a genuine dismissal of an indictment. But as *Sisson* makes clear, before an appellate court may exercise jurisdiction, it must inquire into the real nature of the trial judge's action to make certain that it is not an acquittal barring appeal. Thus the crucial consideration in this inquiry is whether the judge's decision was on the merits, that is, did it hinge on the facts adduced at trial or rather was it made independently "on the face of the record." In *Sisson*, Judge Wyzanski clearly relied upon the evidence at trial, and, in particular, on the demeanor of the defendant. In granting an arrest of judgment, he first made a finding on the factual issue of Sisson's sincerity as a conscientious objector.

Judge Travia's dismissal of the indictment against Jenkins, on the other hand, was essentially a legal determination construing the statute on which the indictment was based. 50 U.S.C. App. § 462(a).[5] In

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[5] Specifically, Judge Travia was of the view that 50 U.S.C. App. § 462(a), making it a crime to fail to comply with an induction order, was qualified by 32 C.F.R. § 1625.2, which provided that

> The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the cur-

contrast to Judge Wyzanski, Judge Travia was not required to resolve any factual issues in order to reach his decision. It is true that the judge did make nine findings of fact. But of these, six had no bearing whatever on the pivotal legal issue, whether or not the pertinent statute required an individual to report for induction if his post-induction notice re-

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rent deferment of the registrant in a case involving occupational deferment, if such request is accompanied by information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

In Judge Travia's view, this provision relieved an individual who had received his notice from reporting for induction so long as his request for reclassification was pending. This view was in conflict with the law in the Second Circuit at the time, *United States* v. *Mercado*, 478 F.2d 1108 (1973), the weight of authority in the other circuits, *e.g. Ehlert* v. *United States*, 422 F.2d 332 (9th Cir. 1970), *Davis* v. *United States*, 374 F.2d 1 (5th Cir. 1967), *United States* v. *Al-Majied Muhammed*, 364 F.2d 223 (4th Cir. 1966), *United States* v. *Taylor*, 351 F.2d 228 (6th Cir. 1965), and the position adopted by the Supreme Court after the date Jenkins was to report for induction, but before Judge Travia's decision. *United States* v. *Ehlert*, 402 U.S. 99 (1971).

quest for conscientious objector status was still pending. Indeed, these six findings were undisputed. In any event, as the *Sisson* Court noted in discussing *United States* v. *Halseth*, 342 U.S. 277 (1952), even where the parties go so far as to stipulate facts not contained in the indictment for purposes of a motion to dismiss, an appeal will lie so long as "the facts in the stipulation were irrelevant to the legal issue." 399 U.S. at 285.

The other three findings of fact simply established that the defendant requested and returned the appropriate form for claiming consicentious objector status. While these findings bear some relation to the trial judge's ultimate conclusion of law—that Jenkins need not have reported for induction during the pendency of his request for reclassification—they hardly represent the sort of foundation for the decision that the findings in *Sisson* did. At no time, for example, was the court called upon to resolve a factual issue regarding whether the application for reclassification by Jenkins had actually been filed. To be sure, the government at the time of the return of the indictment was fully aware of this request for reclassification, having had access to his selective service file. The government could easily have made mention of that claim for conscientious objector status in the indictment. Had that been done, there would be no doubt but that Judge Travia's decision would have been "on the face of the record" and thus a genuine dismissal of the indictment rather than an acquittal on the merits.

We do serious harm to the fair administration of criminal justice when we belabor technical requirements to the point where inclusion or omission of three innocuous, uncontested statements in the indictment ultimately determine whether the government may appeal from the trial judge's decision in a criminal case. We would also be penalizing the government for following a well-established and until now unquestioned rule that indictments need not state the entire factual background of a case, but may simply track the language of the statute allegedly violated and, in addition, do little more than state time and place in approximate terms. *See* F.R.Cr.P. 7(c); *United States* v. *Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969).

The Supreme Court's decision in *United States* v. *Boston & Maine R.R. Co.*, 380 U.S. 157 (1965), offers substantial support for these views. That case involved an appeal by the government from a dismissal of one count of an indictment charging a violation of § 10 of the Clayton Act, which prohibits any commercial dealings by a common carrier in an amount greater than $50,000 with another enterprise in which officers of the carrier have "any substantial interest." Count I of the indictment had charged that the Boston & Maine R.R. and three of its officers had violated § 10 by arranging a sale of railroad equipment valued in excess of $50,000 to the International Railway Equipment Corp., in which the officers had a "substantial interest."

The trial judge recognized that the indictment itself was sufficient to withstand the defendants' motion to dismiss. But based on information presented in the bill of particulars, he granted the motion. The bill of particulars had described the "substantial interest" cited in the indictment as consisting of an agreement among the defendants to use their efforts to produce profits for International Railway and that they would then get a share of these profits. On the basis of this description, the court found no violation of § 10 since "substantial interest" within the meaning of the statute was "limited to one who has a then present legal interest in the buying corporation . . ." The government appealed directly to the Supreme Court under § 3731 and the Court, without expressing any reservations as to its jurisdiction, reviewed the case, ultimately vacating the trial judge's decision and remanding for further consideration.

Just as in *Boston & Maine R.R.* the indictment here charged a criminal offense; yet, on the basis of certain undisputed facts not contained in the indictment, the trial judge construed the underlying statute as not applicable to the particular case. In light of this substantial similarity between the cases, *Boston & Maine R.R.* offers strong support for permitting an appeal in the present case.[6]

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[6] It is, of course, true that in *Boston & Maine R.R.* the appeal was brought under the former version of § 3731, while the appeal in the present case has been raised under the amended § 3731. Nevertheless, as the majority opinion correctly suggests, the amendments to § 3731 were in no way intended to

But entirely apart from the question whether Judge Travia's decision was a dismissal of an indictment or an acquittal, I believe there is still another reason for permitting the government to appeal in this case. Simply stated, it is my view that the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case. As Judge Friendly's thoroughgoing history of the Clause reveals, its evolution has been clouded with contradictions, inconsistencies, and uncertainties. It would be a serious mistake slavishly to adhere to a rigid application of this fifth amendment protection. An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice.[7] Only last term, the Supreme Court in *Illinois* v. *Somerville*, 410 U.S. 458 (1973), rejected the notion that technical errors

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restrict the government's right to appeal. Thus, if an appeal could have been brought under the prior § 3731, it may be brought under the amended version of the statute. *See* p. 700 *supra*.

[7] For quite some time, legal commentators have urged a more flexible analysis in determining whether the Double Jeopardy Clause is applicable to the circumstances of a particular case. *See generally* Mayers & Yarbrough, *Bix Vexari:* New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1 (1960); Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965).

resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again." 410 U.S. at 470.

I believe that the "ends of public justice" will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law. That Jenkins is guilty would appear to be indisputable in light of our decision in *United States* v. *Mercado*, 478 F.2d 1108 (1973), in which we held without reservation that even prior to *United States* v. *Ehlert*,[8] the law of this circuit was that an individual had to report for induction although his post-induction notice claim for conscientious objector status was still pending.

Accordingly, I would vacate the order of the court below and remand for a proper application of the law.

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[8] 402 U.S. 99 (1971). In *Ehlert*, the Supreme Court held that an individual must comply with an induction notice even though his post-induction notice request for reclassification as a conscientious objector has not yet been decided. The individual, whose beliefs had crystallized between notice and induction, would be entitled to a prompt in-service determination of his claim.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 71-CR-1315

UNITED STATES OF AMERICA

-against-

RONALD S. JENKINS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

October 24, 1972

APPEARANCES:

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JAMES S. CARROLL, ESQ.
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New York, New York 10027

TRAVIA, D. J.

This action having come on to be heard before this court on the 3rd day of October, 1972, and the defendant having, by duly executed stipulation approved by this court, waived a trial by jury, [Court Exh. #1], and the evidence of the parties having been adduced, and the attorneys for the parties having submitted their pretrial and post trial memoranda and upon all the papers on file in this action, and after due deliberation this court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

2. Defendant registered with Local Board No. 50, Brooklyn, New York, on September 23, 1966.

3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

4. On January 20, 1971, the defendant was given a pre-induction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board

and requested SSS Form 150 for a conscientious objector classification.

7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his request for a postponement of his induction had been denied.

8. The defendant did not report for induction on February 24, 1971.

9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971.

Discussion

The essence of the defendant's defense is that at the time of his alleged commission of the crime, viz., his refusal to submit to induction, the law of the Second Circuit was such that he was entitled to a postponement of his induction to enable the Board to pass on the merits of his claim for C.O. status. Defendant contends that the failure of the Board to grant such a postponement and hearing was clearly a "lawless" act under the circumstances.[1]

[1] 32 C.F.R. § 1625.2 reads in pertinent part:

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . provided, . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In the case at bar, the defendant went to the Local Board and requested a Form 150 on February 23, 1971. At that time, he was asked to write a short note which not only requested the Form 150, but which also set out the basis for his claim. This court is of the opinion that this written note fulfilled the requirement of 32 C.F.R. § 1625.2, so that the "Board may reopen the classification."

At the time the defendant JENKINS was to be inducted into the Armed Forces, the opinion in the case of *United States* v. *Geary*[2] had construed the meaning of § 1625.2 for the court. The defendant in that case had similarly requested conscientious objector status after he had received his order to report for induction. He was convicted in the Federal District Court after refusing to take the symbolic step forward, but the United States Court of Appeals, Second Circuit, vacated the judgment of conviction and remanded the case to the District Court for further action.

In *Geary*, the court did not hesitate to squarely face the issue of whether a person could be classified as a conscientious objector by the board if his views crystallized after he had received his induction notice. The court concluded:

> "The long history of exempting conscientious objectors, coupled with the specific statutory right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious

[2] 368 F.2d 144 (2d Cir. 1966).

objectors, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures—*even if this occurs after an induction notice is sent but before actual induction*—be entitled to have his application considered by the Local Board. *In light of this, the Local Board must first determine when an applicant's beliefs matured.* If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened. If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred 'resulting from circumstances over which the registrant had no control,' and he would be entitled to be reclassified by the Local Board." [3] (Emphasis added.)

It is clear that in the instant case, the defendant JENKINS raised his claim during the period when *Geary* was controlling in this circuit.[4] However, the

[3] *Id.* at 150. Other circuits had reached an opposite conclusion. *See e.g., Ehlert* v. *United States*, 422 F.2d 332 (9th Cir. 1970); *United States* v. *Al-Majied Muhammad*, 364 F.2d 223 (4th Cir. 1966); *Davis* v. *United States*, 374 F.2d 1 (5th Cir. 1967); *United States* v. *Taylor*, 351 F.2d 228 (6th Cir. 1965).

[4] *Geary* was decided on October 21, 1966 and remained in effect until the Supreme Court's decision in the *Ehlert* case, which decision was handed down April 21, 1971. The facts in this case clearly indicate that Jenkins comes within the "pre-Ehlert" period.

local board did not consider Jenkins' claim, as provided for under *Geary*, and he was denied a postponement of his scheduled induction. The defendant JENKINS did not report for induction on February 24, 1971, and it is for that reason that he is before this court under indictment.

The defendant urges that the "lawless" action of the Board, in not considering his claim, should not be a basis for penalizing him, for he had been "acting consistently with applicable decisional law." The Government, in their original memorandum, maintained that the case of *United States* v. *Ehlert*, 402 U.S. 99 (1971), is retroactive, and "the local board need not consider post-induction conscientious objector claims." More recently, the Government in an effort to supplement their original argument of retroactivity, contends that the ruling in *Geary* was clearly erroneous and as such the local boards were not obligated to follow its mandates. Such a ruling has not been made in the Second Circuit.

This court is aware that from April 21, 1971, the day *Ehlert* was decided, the Local Selective Service Boards do not have to entertain claims allegedly arising within the period between the mailing of a notice of induction and the scheduled induction date. The Government, in an effort to support their contention that the local board was not bound by *Geary*, refers this court to the following cases: *Capobianco* v.

Melvin Laird;[5] *United States* v. *Nordlof*, 454 F.2d 739 (7th Cir. 1971); *United States* v. *Collins*, 445 F.2d 653 (9th Cir. 1971); *United States* v. *Hand*, 443 F.2d 826 (9th Cir. 1971); *United States* v. *Kilby*, 446 F.2d 1002 (5th Cir. 1971); and *United States* v. *McKee*, 446 F.2d 974 (4th Cir. 1971). Significantly, only one of the above mentioned cases was decided in our circuit and this court will, therefore, rely primarily on that case.

In *Capobianco*, *supra*, the Second Circuit initially applied the *Geary* rule and thereby reversed an order of the district court which had denied an application from a member of the Armed Forces for a writ of habeas corpus. The applicant sought to have his conscientious objector claim considered by the Local Board, even though he had raised it after he had received his induction notice. The Court of Appeals for the Second Circuit, in light of *Geary*, directed the district court to issue the writ. Thereafter, in a subsequent order, the same court reversed its earlier order and affirmed the district court's denial of a writ of habeas corpus. The basis of this subsequent order was the decision of the Supreme Court in the *Ehlert* case. While it appears that this second order lends support to the proposition that *Ehlert* is retroactive, we must not overlook the fact that *Capobianco* involved a soldier already in the Army who would not be subject to criminal penalties by the retroac-

[5] *Capobianco* v. *Melvin Laird*, 424 F.2d 1304 (2d Cir. 1971), was vacated by a subsequent order of the Second Circuit dated July 1, 1971. (69-C-1039)

tive application of *Ehlert*.[6] In the case at bar, the retroactive effect of *Ehlert* would be to render illegal the conduct of Jenkins, when at the time he pursued this course it was incumbent upon the local board to consider his claim prior to induction.

It is well settled, that where contrary rulings have been made in other circuits, this court would be permitted, in the absence of any decisional guidance from our own circuit, to chart its own course. However, the Geary case was decided by our circuit and, therefore, this court is constrained to abide by its teachings. Further, even accepting *arguendo* that this court would follow the ruling of a foreign circuit, the *Nordlof* case, *supra*, would not be of any aid to the Government in its contention that *Ehlert* is retroactive. In that case, the settled law of the circuit at the time when *Nordlof* refused induction was that § 1625.2 did not allow post-induction notice claims to be heard by the Board.[7] Thus, the defendant would not be prejudiced by a retroactive application of *Ehlert*, for it would only serve to affirm the settled law of the circuit. It cannot be overemphasized that the decisional law of this circuit, when Jenkins refused induction, was that the Board was obligated to entertain his claim and pass upon it. Similarly, the *Collins*, *Hand*, *Kilby*, and *McKee* cases,

[6] This court is of the opinion that the language in the *Ehlert* case does not in and of itself support the contention that the Supreme Court's ruling is to be applied retroactively in all cases.

[7] *See Porter* v. *United States*, 334 F.2d 792 (7th Cir. (1964).

[*supra*], all involved instances where *Ehlert* was not overturning the case law as it had previously existed in those circuits.[8] Accordingly, those defendants would not be prejudiced, as the defendant JENKINS would be, by a retroactive application of *Ehlert*; when they refused induction they had not been apprised of the fact, through the interpretation of § 1625.2 in that circuit, that they would have to be heard by the Board on their claims.

This court's own research has disclosed one significant case which must be discussed, and that is *United States* v. *Johnson*, 443 F.2d 189 (2d Cir. 1971).[9] On October 9, 1969, defendant Johnson was mailed his Order to Report for Induction, which was fixed for November 9, 1969. Defendant appeared at the Board on October 17, 1969, and requested an application for conscientious objector status, which was given to him. At the same time, his induction date was postponed, "pending C.O. review." Some two months later, on December 18, 1969, the Local Board notified Johnson that it was cancelling his postponement of induction for failure to return his SSS Form 150 (for conscientious Objectors), and he was again ordered to report for induction, which he refused to do. He was later convicted for failure to report for induction into the Armed Forces, as mandated by 50 U.S.C. App. § 462(a), and his conviction was affirmed.

[8] Indeed, the law of the Fourth Circuit [*United States* v. *Al-Majied Muhammad*, 364 F.2d 223 (4th Cir. 1966)] and the Fifth Circuit [*Davis* v. *United States*, 374 F.2d 1 (5th Cir. 1967)] had been consistent with the subsequent *Ehlert* decision when the defendants refused induction in *McKee* and *Kilby*. It had been unsettled in the Ninth Circuit when the defendants refused induction in the *Collins* and *Hand* cases mentioned, *supra*. The subsequent Supreme Court *Ehlert* decision, which decided the issue adversely against the defendant, came from the Ninth Circuit, however. *See Ehlert* v. *United States*, 422 F.2d 332 (9th Cir. 1970).

In this area, consider also the recent cases of *United States* v. *Cotton*, (71-CR-935, Aug. 4, 1972), and *United States* v. *Shomock*, 462 F.2d 338 (3d Cir. 1972), which, however illuminating, are nonetheless distinguishable from the case at bar.

[9] This court does note that for some unexplained reason this case *was not* cited *by either of the parties*. Such an oversight clearly cannot go unnoticed.

While *Geary* was controlling at the time Johnson refused induction, the Court of Appeals concluded that the Local Board had not reopened Johnson's file. Specifically, the court stated that:

> ". . . it appears that all that happened was that the Board was considering whether to reopen defendant's classification, and chose not to."

The circumstances described in the *Johnson* case, *supra*, at first blush seem to be dispositive of the case at bar. Yet, a careful reading will disclose that the situation in *Johnson* differs from that in Jenkins in that Johnson was given an opportunity to be heard *via* the postponement. It was through his own delay of two months in failing to return Form 150 that subjected him again to induction after it had already been once postponed. It cannot be over-emphasized that the postponement granted Johnson was for the obvious purpose of allowing him to pursue his claim through the completion of Form 150. The defendant

in this case, on the other hand, was *denied* postponement only one day prior to his induction date; he was given no opportunity to be heard on his claim. Hence, it was not a situation as in *Johnson*, where the late filing of Form 150 would serve to ". . . indefinitely . . . postpone his duty to report." *United States* v. *Johnson*, 443 F.2d 189, 192 (2d Cir. 1971).

In closing, this court must emphasize that its decision with respect to the defendant must not be overread. In this case, Jenkins would be clearly prejudiced by any attempt to apply, retroactively, the Supreme Court's decision in *Ehlert*. This court cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law. This is not to say, however, that under other circumstances a retroactive reading of *Ehlert* would not be warranted.

CONCLUSIONS OF LAW

1) The indictment in this case is dismissed and the defendant is discharged.

2) The conclusion of this court is not to be construed as relieving this defendant of his obligation under the Uniform Military Training & Service Act. Local Board No. 50 is directed to reopen the case of this defendant to consider his application for C.O. status in accordance with the regulations.

/s/ Anthony J. Travia
U. S. D. J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. WILFRED FEINBERG
Circuit Judges

73-1572

THE UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

v.

RONALD S. JENKINS, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from judgment of said District Court be and it hereby is dismissed for lack of appellate jurisdiction in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by /s/ Vincent A. Carlin
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the SIXTH day of February, one thousand nine hundred and seventy four.

Present:

HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. WILFRED FEINBERG
Circuit Judges

Docket No. 73-1572

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

vs.

RONALD S. JENKINS, DEFENDANT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 O 558320 216

Supreme Court, U. S.
FILED
JUL 16 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1513

UNITED STATES OF AMERICA,
Petitioner,
—v.—
RONALD S. JENKINS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED MAY 28, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1513

UNITED STATES OF AMERICA,

Petitioner,

—v.—

RONALD S. JENKINS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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* Copies of the decisions of the district court and court of appeals below were attached to the petition for a writ of certiorari.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12-21-71	Before WEINSTEIN, J.—Indictment filed.
1-13-72	BEFORE NEARER, J.—Case called. Deft and counsel present. deft. arraigned and enters a plea of not guilty. 45 days for all motions. Deft cont'd on O.R.
1-14-72	Magistrate's file 72 M65 inserted in criminal file.
5-23-72	Govts Notice of Readiness for Trial filed.
6- 2-72	Before TRAVIA, J.—Case called & adjourned to 6-16-72 for trial at 10 AM.
6-16-72	Before TRAVIA J—Case called & adjd to July 17, 1972 for Trial.
7- 8-72	Notice of motion concerning Voir Dire filed.
7- 8-72	Notice of motion for judgment of acquittal filed.
7- 8-72	Notice of motion for requests to charge the jury filed.
7- 8-72	Trial memorandum of law filed.
7 8-72	Certificate by J.L. Curtis of service of motions to US Atty Office filed.
7-14-72	Notice of motion filed concerning voir dire in opposition to defts & govt's trial memorandum filed.
7-17-72	Before TRAVIA, J.—Case called. Adjourned to 9-5-72 at 10 A.M. for trial.
9- 5-72	Before Travia J—Case called & adjd to 9-25-72 for Trial.
9-22-72	Notice of motion filed ret 9-25-72 for an order to substitute prosecutor.
9-25-72	Before Travia J—Case called—marked ready subject to case on trial 70 CR 576. Motion to substitute U.S. Attorney—Motion granted.
10- 3-72	Before TRAVIA, J.—Case called. Deft & counsel James Carroll present.—Trial ordered and be-

DATE	PROCEEDINGS
	gun. Stipulation signed waiving jury trial.—Deft reserves all rights to make motions at close of govt's case.—Both sides rest. Decision reserved. Deft to file brief by 10-11-72. Govt brief by 10-13-72. Trial concluded.
10- 3-72	Waiver of Trial by Jury filed.
10-16-72	Deft's memorandum of law filed.
10-26-72	Findings of Fact and Conclusions of Law filed.
10-24-72	By Travia J—Findings of Fact and Conclusions of Law filed. 1) The Indictment in this case is dismissed and the deft is discharged. 2) the conclusion of this court is not to be construed as relieving this deft of his obligation under the Uniform Military Training & Service Act. Local Board No. 50 is directed to reopen this case to consider the defts application for C.O. status in accordance with the regulations.
11- 8-72	Copy of letter dated 11-6-72 from Judge Travia & copy of memorandum of law filed.
11- 8-72	Letter dated 10-31-72 from James S. Carroll for deletion of footnote 9 filed.
11- 8-72	By TRAVIA, J.—Order dated 11-3-72 filed that footnote 9 be and the same is deleted from the findings of fact and conclusions of law in this case dated 10-24-72 (Order on bottom of letter from James S. Carroll dated 10- * * *
11-21-72	Government's notice of appeal from order of 10-24-72 filed. Duplicate of notice of appeal & duplicate of docket entries to C of A. jn
12-21-72	Stenographer's transcript of 10/3/72 filed.
4-23-73	Index to Record on Appeal certified and mailed to the C. of A.
4-26-73	Acknowledgment recd and filed from the C. of A. for receipt of the Index Record.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 71 CR 1315
(50 USC App., § 462(a))

UNITED STATES OF AMERICA

— against —

RONALD S. JENKINS, DEFENDANT

INDICTMENT

THE GRAND JURY CHARGES:

On or about and between the 24th day of February 1971, and the date of filing of this indictment, within the Eastern District of New York, the defendant RONALD S. JENKINS, a person registered pursuant to the Universal Military Training and Service Act, as amended, the Proclamations of the President of the United States, and the Regulations issued and promulgated pursuant to said Act, knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to submit to induction into the armed forces of the United States, after notice had been given to the defendant by Local Board No. 50, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 24th day of February 1971. (Title 50 U.S.C. App., § 462(a).)

A TRUE BILL.

_____

Foreman.

_____

ROBERT A. MORSE
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

No. 71 CR 1315

UNITED STATES OF AMERICA, PLAINTIFF

— against —

RONALD JENKINS, DEFENDANT

MOTION FOR JUDGMENT OF ACQUITTAL

The defendant moves the Court for a Judgment of Acquittal for each and every one of the following reasons:

1. The denial of the defendant's claim as a conscientious objector was without basis in fact, arbitrary and contrary to law in that the Local Board did not provide a hearing to the defendant on his C.O. claim in violation of Selective Service Regulations.
2. The failure of the local board to postpone the induction order pending the determination of the defendant's claim as a conscientious objector was arbitrary and contrary to law and rendered the Order to report for induction invalid. *United States* v. *Geary*, 368 F.2d 144 (2nd Cir. 1966).
3. The defendant did not intentionally fail to submit to induction, but was in fact acting in accordance with his conscience and belief in awaiting a determination by the Local Board as to his C.O. claim.

Respectfully Submitted,

/s/ James S. Carroll
JAMES S. CARROLL
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

71-CR-1315

UNITED STATES OF AMERICA

— against —

RONALD S. JENKINS, DEFENDANT

United States Courthouse
Westbury, New York
October 3, 1972
11:00 o'clock A.M.

Before:

HONORABLE ANTHONY J. TRAVIA,
U. S. D. J.

GERALD I. METZ,
Acting Official Court Reporter

[2] Appearances:

ROBERT A. MORSE, ESQ.,
United States Attorney for the
Eastern District of New York

BY: PAUL WARBURGH, ESQ.,
Assistant U.S. Attorney

JAMES S. CARROLL, ESQ.,
Attorney for the Defendant.

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[3] THE COURT: U.S. Against Jenkins. Both sides ready?

MR. WARBURGH: The Government is ready.

MR. CARROLL: Defendant is ready.

THE COURT: Both sides ready, all right.

MR. WARBURGH: Your Honor, it's my understanding that the defendant is going to waive a jury trial and he has signed a stipulation to that effect.

THE COURT: Would you come up Mr. Carroll and also Mr. Jenkins?

Mr. Jenkins, how old are you?

THE DEFENDANT: 24.

THE COURT: How far did you go in school?

THE DEFENDANT: Junior year in college.

THE COURT: Which college?

THE WITNESS: A&T State University

THE COURT: Which is it?

THE DEFENDANT: A&T State University.

THE COURT: Have you for any reason at all been in any hospital in the last couple of years?

THE DEFENDANT: I have been in the university infirmary.

[4] THE COURT: For what purpose?

THE DEFENDANT: For an ankle injury.

THE COURT: Anything else?

THE DEFENDANT: Also for a bronchial condition that I was treated for, X-rayed and after about two, three months' treatment, I was out.

THE COURT: How long ago was that?

THE WITNESS: This was in '70.

THE COURT: Are you all right now?

THE DEFENDANT: Yes.

THE COURT: Are you still being treated for it?

THE DEFENDANT: No.

THE COURT: In other words, you are better now, and you are not being treated any more?

THE DEFENDANT: No.

THE COURT: Mr. Carroll is your own retained attorney, is he?

THE DEFENDANT: Yes, he is.

THE COURT: You have talked to him about this case?

THE DEFENDANT: The—

[5] THE COURT: Seeking his advice as a lawyer?

THE DEFENDANT: Yes.

THE COURT: Has he explained to you what this case is all about?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand what he's told you about this case?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything about this matter that you don't understand? I am asking you these questions preliminarily to asking you why you wish to waive a jury trial. I want to make sure that you know what you are doing.

THE DEFENDANT: What was your—

THE COURT: My last question was, is there anything about this case that you don't understand?

THE DEFENDANT: No.

THE COURT: In other words, you are familiar with the situation, the reason you are here before this Court on this indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Now, your lawyer and the [6] Government lawyer advised me that you wish to waive a jury trial here.

THE DEFENDANT: Yes.

THE COURT: You realize what you are giving up?

THE DEFENDANT: Yes.

THE COURT: You understand that if you wished, you are entitled to a jury trial, you are entitled to have this case tried by a jury, you know that?

THE DEFENDANT: Yes.

THE COURT: And the jury might or might not find you guilty, right?

THE DEFENDANT: Yes.

THE COURT: They could very well find you not guilty as well as they could find you guilty, right?

THE DEFENDANT: Yes.

THE COURT: If you waive that right, you have that right lost to you, you know that?

THE DEFENDANT: Yes.

THE COURT: And you would have the right at the close of the case to argue to the jury through your attorney as to why you think you [7] are not guilty, right?

THE DEFENDANT: Yes.

THE COURT: And you have 12 people in the jury who would decide your fate, you understand that?
THE DEFENDANT: Yes.
THE COURT: You are willing to give all that up and allow this Court to render a verdict with regard to you after hearing all the evidence against you?
THE DEFENDANT: Yes.
THE COURT: Now, you have talked about this waiver of a jury trial with Mr. Carroll, your lawyer, right?
THE DEFENDANT: Yes, I have.
THE COURT: Has he convinced you to do this or is this done by you voluntarily of your own desire after discussing it with Mr. Carroll?
THE DEFENDANT: Yes, it is.
THE COURT: Is it your own desire?
THE DEFENDANT: Yes, it is.
THE COURT: In other words, Mr. Carroll didn't say to you you should do this, did he?
THE DEFENDANT: No.
[8] THE COURT: He advised you regarding the case and told you the pros and cons of waiving a jury?
THE DEFENDANT: It's my decision.
THE COURT: And it is your decision.
THE DEFENDANT: Yes.
THE COURT: There is no language difficulty, is there, you understand everything?
THE DEFENDANT: Yes, sir.
THE COURT: Have you talked about this with your family?
THE DEFENDANT: The waiver?
THE COURT: Yes.
THE DEFENDANT: Yes.
THE COURT: They know about it?
THE DEFENDANT: Yes.
THE COURT: They know that you made this decision?
THE DEFENDANT: Yes, sir.
THE COURT: Now I ask you again, is it your choice, your desire, your wish to waive your rights to a jury trial in this case?

THE DEFENDANT: Yes, it is.
THE COURT: Now I have before me a waiver [9] of a jury trial dated October 3, today's date, which apparently is signed by you, Mr. Carroll and Mr. Warburgh. Will you look at those signatures? Is the top one yours and did you see Mr. Carroll and Mr. Warburgh sign that one?
THE WITNESS: I saw Mr. Carroll sign it.
THE COURT: Mr. Warburgh signed it after you, Mr. Carroll?
MR. CARROLL: I don't really—yes, I think he did.
THE COURT: But that is your signature?
THE DEFENDANT: Yes, it is.
THE COURT: Before I sign it, is there anything you want to ask me?
THE DEFENDANT: No.
THE COURT: May the record indicate that I am approving the stipulation waiving a jury trial by jury and that the case be tried to the Court without a jury.
It's received and marked for identification.
Do you want to make a statement first? Do both of you want to make an opening statement?
MR. CARROLL: No, your Honor. I waive the right to make an opening statement.
[10] THE COURT: Mr. Carroll waives an opening statement.
MR. WARBURGH: Unless you want the Government to make an opening statement, I would waive that.
THE COURT: Both sides waive opening statements. Then call your first witness.
MR. WARBURGH: The Government calls as its first witness Mrs. Elaine Morris.
MR. CARROLL: Excuse me. Could I just request—
THE COURT: Elaine Morris.
What's the request, Mr. Carroll?
MR. CARROLL: I had two witnesses here. I just requested the witnesses excuse themselves.
THE COURT: They were your own witnesses?
MR. CARROLL: Yes.
THE COURT: You know they have a witness room right on the other side. They know that. Instead of

just standing out in the hall, they can sit down in that witness room.

[11] ELAINE MORRIS, called as a witness on behalf of the Government, after having been first duly sworn by the Clerk, testified as follows:

THE CLERK: Your address, Miss Morris? Is it Miss or Mrs.?

THE WITNESS: It's Miss.

THE CLERK: And your address?

THE WITNESS: 212 Linden Boulevard, Brooklyn, New York.

THE CLERK: Thank you. Be seated.

THE COURT: Mr. Carroll, if you have any difficulty hearing, let me know and we could put the mike on, we can activate the mike.

Miss Morris, try to speak up loudly.

MR. CARROLL: Would it be possible to do that now, rather than my having to interrupt her testimony?

MR. WARBURGH: Your Honor, by agreement of counsel I would like to offer into evidence what will be marked as Government's exhibit 1, which is the file of this defendant. Is that correct, Mr. Carroll?

MR. CARROLL: So stipulated.

[12] MR. WARBURGH: The Selective Service file.

THE CLERK: Selective Service file marked Government's exhibit 1 in evidence.

MR. CARROLL: So stipulated by the defense.

(So marked.)

DIRECT EXAMINATION

BY MR. WARBURGH:

Q Miss Morris, would you tell the Court what your occupation is?

A I am executive secretary of Local Board Group.

Q Where is that local board located?

A 271 Cadman Plaza, Brooklyn, New York.

Q That local board is part of the Selective Service system; is that correct?

A That's correct.

THE COURT: What's that local board number?

THE WITNESS: Local Board 50.

Q Miss Morris, how long have you been connected with Local Board 50?

A Oh about 20 years.

Q Referring to Government's exhibit 1, which is [13] before you, can you tell the Court when the defendant, Ronald Steven Jenkins, registered with the local board?

A His date of registration was September 7, 1966.

Q Referring again to Government's exhibit 1, can you locate in there a document entitled, "Classification questionaire, form 100"?

A Yes.

Q Referring to that document, Classification questionaire form 100, can you tell the Court—

THE COURT: Does Mr. Carroll have a copy of that?

MR. CARROLL: I have.

MR. WARBURGH: I believe the defendant has a copy of the entire file.

THE COURT: I just want to make sure we were together on the one he's talking about.

Q Referring to that form 100 classification questionaire, can you tell the Court the date that that questionaire was sent to the defendant?

A It was mailed on September 9, 1966.

Q Can you tell the Court whether that questionaire was returned by the defendant?

A Yes, it was.

Q What date was that?

[14] A It was received by the local board on September 23, 1966.

Q Referring again to that questionaire, did the defendant complete the conscientious objector part of that questionaire?

A No, he did not.

Q Referring to the part of the questionaire involving physical condition, did the defendant complete any part of that part?

A Yes, he did.
Q Can you read what he completed?
A Yes. He completed series two. He stated, "hip operation."
Q Was that in response to a question on the questionaire number two?
A Yes.
Q What was that question?
A It asks: "If you have any physical or mental condition in your opinion which would disqualify you for service, state the condition and attach a physician's statement."
Q And his response to that was what?
A "Hip operation."
Q Referring again to Government's exhibit 1, [15] specifically to minutes of action, on September 27, 1966, did the local board send the Defendant a letter, form 56?
A Yes.
Q Can you locate that in the file?
A Yes.
Q What is the date of that letter?
A September 27, 1966.
Q Can you tell the Court what that letter says?
A Well, the letter requests the registrant to submit medical evidence to the local board within one week and to include statements from doctors who have treated him, reports from hospital, if confined or treated. Those reports were to give specific information as to the diagnosis, dates and types of treatment and any other information which was considered necessary to fully explain his physical defects.
Q Referring to Government's exhibit 1 was there any response to that letter?
A No, there was—yes, there was.
Q What was that response?
A A letter was received and a clinic card from registrant's mother.
Q Can you indicate to the Court what that letter from the mother said?
[16] A Do you want me to read it in its entirety?

Q Why don't you read it in its entirety.
A It says: "I am writing in reference to the letter you wrote my son Ronald Jenkins. He sent me the letter to write you as he is in college in Morristown, Tennessee and can't get the medical reports that you need. Right now I am sending you his medical center card. He has to report to them every year since his operation. I will have to write to his other doctor and have him send in a report which takes time. I'm sending you the doctor's name, which is Dr. H. Simmons, 545 Nostrand Avenue, Brooklyn, New York. I will also write to medical center.
"I hope you understand why this will take more than a week as you specified in your letter. Any other information that you need that will have to be gotten from Brooklyn or Manhattan, please write to me.
"Thank you for your kindness.
"Yours truly, Mrs. Phyllis Jenkins."
Q Was there any other information that was sent to the local board in response to that form 56 that was filed, that was sent to the defendant?
A No. At that time no, there wasn't.
Q Now referring to Government exhibit 1, the minutes of action by local board, can you tell the Court [17] whether on October 5, 1966—strike that.
On October 19, 1966 did the local board classify the defendant 2-S?
A Yes, they did.
Q How long was that classification to remain?
A Until October of '67.
Q Previous to October, 1966 had the defendant been classified at all?
A No, he was not.
Q Again referring to Government's exhibit 1, the minutes of action by the local board, on November 15, 1967 was the defendant again classified 2-S?
A Yes, he was.
Q Was that classification to remain until October of 1968?
A Yes.

Q Again referring to Government's exhibit 1, the minutes of local action, on January 15, 1969 was the defendant again classified 2-S?

A Yes.

Q Was that classification to continue until October 1969?

A Yes.

THE COURT: Until October, 1969?

[18] MR. WARBURGH: Yes, your Honor.

Q Again referring to the minutes of action by the local board, on October 29, 1966 was the defendant again classified 2-S?

A Yes.

Q Was that classification to remain until October of 1970?

A Yes.

MR. CARROLL: Objection as to leading, your Honor.

THE COURT: It is leading, but it saves a lot of time.

MR. WARBURGH: The file is in evidence.

THE COURT: The whole file is in evidence. The question is nevertheless leading, but in order to expedite this I will allow it. I will give you some latitude with respect to that.

We have no jury here. If you wish, I can ask him not to lead, but we're going to get to the same—

MR. CARROLL: We are getting to crucial parts at this point.

THE COURT: If you think that we are, then make your objection.

[19] Q Now Miss Morris, referring to the minutes of the local board action, specifically to November 18, 1970, can you tell the Court what occurred on that day?

A The registrant was classified 1-A.

MR. WARBURGH: May I have this document marked as Government exhibit 2?

THE CLERK: Government exhibit 2 for identification, one blank notice of classification card.

(So marked.)

Q Miss Morris, are you familiar with the procedure of the local board after a defendant has been classified 1-A?

A Yes, I am.

[20] Q Would you please explain to the Court what happens?

A After classification, form 110, notice of classification—

Q You are referring now to Government's exhibit 2 for identification; is that correct?

A Yes.

Q Would you explain to the Court what happens?

A Form 110, Notice of Classification, is mailed to the registrant advising him of the Board's determination.

Q Referring to Government's exhibit 2 for identification, are there certain rights that the defendant is told that he has?

A Yes.

Q Can you tell the Court what those rights are?

A The registrant is advised that if he is not in agreement with the classification that was arrived at by the local board, he has rights of appeal.

Q That is explained on form 110; is that correct?

A That's correct.

Q After the defendant was classified 1-A on November 18, 1970, did the defendant exercise any of these rights to appeal?

THE COURT: First of all I want to know if such a notice was sent and when.

[21] Q Referring to the minutes of the local board action, was such a notice sent to the defendant?

A Yes, it was.

Q When was that sent?

A November 24, 1970.

THE COURT: Was that similar to the one that you were looking at there, Government's exhibit 2 for identification?

THE WITNESS: Yes, it is.

Q After November 22, 1970, did the defendant exercise any of these rights?

THE COURT: November 24 is the date?

THE WITNESS: Yes.

Q Did the defendant exercise any of these rights to appeal?

A No, he did not.

Q Referring to the minutes of action in Government's exhibit 1, on January 12, 1970 can you tell the Court what the local board did with respect to this defendant on that day?

A Yes. We mailed him a notice of pre-induction examination for January 20, 1971.

Q Do you have a copy of that notice in the file?

[22] A Yes, I do.

THE COURT: What's the date of that notice?

THE WITNESS: January 12, 1971.

THE COURT: To report for a pre-induction when?

THE WITNESS: On January 20, 1971.

Q Referring to that notice to report for a physical examination, can you read the paragraph in bold type?

A It states: "If you have had previous military service or are now a member of the National Guard or a reserve component of the Armed Forces, bring evidence with you. If you wear glasses, bring them. If you have any physical or mental condition which, in your opinion, may disqualify you for service in the Armed Forces, bring a physician's certificate describing that condition if not already furnished to your local board."

Q Now referring to Government's exhibit 1, on January 20, did the defendant report for this physical examination?

A Yes, he did.

THE COURT: Does that notice of pre-induction exam have a form notice?

THE WITNESS: The form number is SSS form 223.

[23] THE COURT: Now, you can refer back to Mr. Warburgh's question. You asked her whether he reported as a result of that physical induction notice.

MR. WARBURGH: I believe the witness' answer was "yes."

Q Did the local board subsequently receive—

THE COURT: When did he report, will you records show when he reported for that exam?

THE WITNESS: Yes. He reported on January 20, 1971.

Q Did the local board subsequently receive, after January 20, 1971, any communication from the physical examination concerning the defendant's acceptability?

A Yes.

Q What was that notification?

A "Received registrant's papers and a statement of acceptability, form 62."

Q Did that form indicate he was acceptable for induction into the Armed Forces?

A Yes, it did.

Q Referring to the medical papers that were received along with that notice of acceptability, did the defendant at the time of the examination indicate that he [24] had a hip condition?

A Yes he did.

Q Referring to the report of the examination, would you tell the Court what was stamped on the examination form?

A "Registrant advised to present medical evidence to support unverified ailments."

Q Now I am going to direct your attention to February 4—

THE COURT: Before you leave that, who signed that form 62?

THE WITNESS: C. O. Dunn, Second Lieutenant, AGC.

THE COURT: What's that?

THE WITNESS: That's all part of his title AGC.

Q Now, referring to the minutes of action of Government's exhibit 1, specifically to February 4, 1971, can you tell the Court what occurred on that day?

A On February 4, 1971, an induction notice was mailed to the registrant for February 24, 1971.

Q Now, Miss Morris, you are familiar with the procedure of the local board in the mailing of these induction notices; is that correct?

[25] A That's correct.

Q Would you tell the Court what the procedure is?

A After receiving the order of call, we then pulled the first men available for induction.

Q During what part of the day is that done?

A The call is pulled in advance to sending out the notifications.

Q In other words, it's some day prior to sending out the notices for induction?

A That's right.

Q On the day that the notices of induction are sent, what time of day are they sent?

A In the morning.

Q What time is mail received by your office?

A The latter part of the morning.

Q Now referring to a letter from the Presbyterian Hospital dated January 26, 1971, can you tell the Court when that was received by the local board?

A On February 4, 1971.

THE COURT: Received February 4th?

THE WITNESS: Yes.

Q Can you read to the Court what that letter says?

[26] A It's addressed to the local board and it says:

"Gentlemen: We have been requested to send you a report. Accordingly we are enclosing a photostatic copy of a letter dated July 14, 1965, which summarizes this patient's case. We have not seen this patient since that time."

Q There were attachments to the letter; is that correct?

A That's correct.

Q And it is your testimony that the induction notices are mailed in the morning?

A That's correct.

Q And the mail that the local board receives on each day is received later on in the morning?

A That's correct.

Q Can you tell the Court whether this letter from the hospital was received before or after the induction notice was sent?

A It was received after the induction notice was sent.

THE COURT: Do you have a time stamp on that?

THE WITNESS: We don't have any time stamps.

THE COURT: Do you have any stamp on that?

THE WITNESS: Yes, we have the local board [27] with the date on it.

THE COURT: What does that stamp indicate?

THE WITNESS: The stamp indicates the number of the local board, the date and the address of the local board.

THE COURT: February 4th?

THE WITNESS: February 4th, correct.

Q Are you familiar with the procedure of the local board concerning any communications that are received by the local board after an induction notice is sent?

A Yes, I am.

Q What is that procedure?

A Anything received by the local board after the induction notice is sent is referred to our New York City headquarters and to our local board members for any consideration, if it is warranted.

Q I refer you to minutes of action of local board, Government's exhibit 1, specifically on February 9, 1971. Can you tell the Court what occurred on that day?

A The registrant appeared at the local board on February 9 and he filed a memo and a 127. He refused to complete the 127 and the memo that was filed stated so.

Q What is form 127?

A It's a current information questionaire. It's an [28] up-date.

Q Now, referring to the minutes of action of Government's exhibit 1, on February 28, 1971, can you tell the Court what occurred on that day?

A The registrant appeared at the local board.

MR. CARROLL: Objection. I think you misread that.

MR. WARBURGH: That's the 23rd, your Honor. I'm reading from a Xerox copy.

A The registrant appeared at the local board October 23, 1971 and he requested form 150.

Q What is form 150?

A That's a conscientious objection claim form.

Q Did the defendant on that day give the local board any documents?

A Yes, he did.

Q What was that document?

A That was his request for a conscientious objector form 150.

Q Can you read to the Court what that says?

A It states: "I am requesting a C.O. 150 form on the grounds that I am morally opposed to the present war and on these moral grounds I don't feel that I could take part in any effort which would or could in any way perpetuate this [29] war. "Signed Ronald Jenkins.

Q Referring back to the induction notice that was mailed on February 4, 1971, what was the date that he was scheduled to report for induction?

A February 24, 1971.

Q Referring to the minutes of action—

THE COURT: He was to report on what date?

THE WITNESS: February 24, 1971.

Q Referring to minutes of action of Government's exhibit 1—

THE COURT: Before you go there, I had down here on 2/4 the induction order was sent to him to report on 2/12.

THE WITNESS: No, he was supposed to report on February 24, 1971.

THE COURT: I don't know where I got 2/12.

THE WITNESS: That's my address.

THE COURT: I have that too.

Q Referring to the minutes of action of Government's exhibit 1, did the local board receive notification as to whether this defendant reported for induction?

A Yes.

[30] Q Did he report for induction?

A No, he did not.

Q When was the local board notified of that?

A On March 8, 1971.

Q Again referring to the notice to report for induction, referring to the notice that was sent to report for induction and referring to the paragraph in bold type and the several words above that, can you read that to the Court?

A "Important notice." Then in parenthesis it states: "Read each paragraph carefully."

[31] Q Would you read the paragraph?

A "If you have had previous military service or are now a member of the National Guard or a reserve component of the Armed Forces, bring evidence with you. If you wear glasses, bring them. If married, bring proof of your marriage. If you have any physical or mental condition which, in your opinion may disqualify you for service in the Armed Forces, bring physician's certificate describing that condition if not already furnished to your local board."

Q Now referring to the minutes of action of Government's exhibit 1, on March 30, '71, can you tell the Court what occurred on that day with respect to this defendant?

A We received form 150.

Q Form 150 requests a classification as a conscientious objector; is that correct?

A That's correct.

Q Referring to the minutes of action of Government's exhibit 1, was any action taken with respect to this request for classification as a conscientious objector?

A Yes.

Q Can you tell the Court what action if any was [32] taken by the local board?

A The local board mailed the entire file and the form 150 to our New York City headquarters.

Q Did you receive any communication from the New York City headquarters after the file had been mailed?

A Yes.

Q What was that communication that was received from New York City headquarters?

A It advised the local board of certain actions pertaining to their request for information and also it stated that: "In view of the above, that the registrant was to be reported to the U.S. Attorney for prosecution on form 301."

THE COURT: What's the date of that?

THE WITNESS: This is dated August 31, 1971.

THE COURT: Who signed that?

THE WITNESS: This is signed by the chief attorney of our New York City headquarters.

Q At the time that the defendant originally presented himself at the local board on February 23, 1971, requesting a form 150, was the New York City headquarters contacted on that day?

A Yes, they were.

Q Did the local board receive certain information [33] from the New York City headquarters?

A Yes.

Q Can you tell the Court what that information was?

A The local board was directed to correspond with the registrant and to forward him a form 150, conscientious objector form, and also advise him of his order to report for induction, his request for postponement was denied.

THE COURT: What date was that?

THE WITNESS: This was on February 23, 1971.

Q With respect to the medical information that was received by the local board on February 4, 1971, what did you do with it? What did the local board do with it?

THE COURT: Are you referring to the letter she received from the Presbyterian Hospital?

MR. WARBURGH: Yes, your Honor.

A At the time of submitting the registrant's papers, record of induction papers to the station, medical information was included.

Q If the defendant had reported for induction, would this information that you had received be at the place where he should have reported for induction?

A Yes.

[34] MR. CARROLL: Objection.

THE COURT: In normal course of the work, first of all, you did what with it when you received the letter from the Presbyterian Hospital which incorporated a photocopy of a report dated back in 1965—is that right?

THE WITNESS: Yes.

THE COURT: With a notation saying they had not seen him since that time?

THE WITNESS: That's correct.

THE COURT: What did you do with that, just put it in the file, or did you do something about it?

THE WITNESS: No, at the time of submitting the registrant's record of induction that was to be determined by the doctors at the Armed Forces examining station, the medical information was attached to these records.

THE COURT: So that it was sent to AFES when?

THE WITNESS: It was forwarded on on February 9, 1971.

THE COURT: Then after they report what do they do, send it back to you?

[35] THE WITNESS: That's correct.

THE COURT: And then when you send out the notice of induction, do you incorporate those papers and send them on to the place where he is to report?

THE WITNESS: Yes, sir.

THE COURT: And it was sent to the place where he was to report on February 24th?

THE WITNESS: That's correct.

Q Do you know what the examining station would have done with this information that was sent to it?

MR. CARROLL: Objection.

Q Do you know?

THE COURT: If she would know.

A Yes.

Q What would they have done?

A The medical doctors would consider the medical information at the time of examination.

THE COURT: In other words, there is a medical examination again at the time of induction?

THE WITNESS: That's correct.

THE COURT: The one we were talking about was a pre-induction one at the time of his classification?

[36] THE WITNESS: That's correct.

THE COURT: All these papers are sent by you regarding a registrant in order to give the induction center all the information that's in your file that might help them in making their determination and their examination?

THE WITNESS: That's correct.

MR. WARBURGH: I have no further questions.

MR. CARROLL: I just have a few questions.

THE COURT: As far as you know, Miss Morris, those papers, including that medical report, were in the hands—at least you mailed them out prior to the 24th of February?

THE WITNESS: That's correct.

THE COURT: Do you recall how many days before that day? Would your papers show?

THE WITNESS: Yes, my list. It was mailed on February 9th.

CROSS EXAMINATION

BY MR. CARROLL:

Q I refer your attention to Government's exhibit No. 1, the minutes of action by the local board, to October 5, 1966. Could you please tell me what occurred [37] on that date?

A I had received a letter of information and a clinic card from the registrant's mother.

Q Referring to the letter received from the registrant's mother, could you please read the last paragraph?

THE COURT: Is that the one she read earlier?

MR. CARROLL: Yes. I just want her to read the last paragraph.

THE COURT: I just want to make sure I know which one you are talking about.

The last paragraph said something, "If you need anything in Brooklyn or Manhattan, let me know" referring to herself.

THE WITNESS: "Any other information that you need that would have to be gotten from Brooklyn or Manhattan, please write to me.

"Thank you for your kindness. Yours truly, Mrs. Phyllis Jenkins."

Q Referring your attention again to Government's exhibit 1, minutes of action of the local board, was there any response by the local board to that letter?

A No, there wasn't.

[38] Q Referring your attention to October 23rd, 1967, which is noted on the minutes of action of the local board, did you receive a form 127 on that date?

A Yes, I did.

Q Reading from series 7, part 2, of the form 127, was there any response noted there by the registrant?

A No.

Q What is the question that is asked at that point in the form 127?

A It's pertaining to physical condition.

Q Could you read that please?

A The first question is: "If you were ever rejected for service in the Armed Forces, state when and where.

"2. If you have any physical or mental condition which in your opinion will disqualify you from service in the Armed Forces, state the condition and attach a physician's statement if not previously submitted.

"3. —"

MR. CARROLL: That will be sufficient. Thank you.

Q Referring yourself to the minutes of action of the local board at February 17, 1969, was a form 127 received on that date?

A Yes, it was.

[39] Q Again directing yourself to series 7 of that form, part 2, was there any response by the registrant to the questionaire?

A Yes.

Q What was the response?

A "Hip pelvis operation."

Q Again referring yourself to the minutes of action of the local board on March 5, 1970, was there any response at series 7 part 2 by the registrant to the question asked therein?

MR. WARBURGH: I have a copy of the minutes of the local board.

MR. CARROLL: I am sorry. I might be wrong.

MR. WARBURGH: You said March 5th.

MR. CARROLL: Excuse me, your Honor. My notes are incorrect. I will have to go through this again.

Q Referring yourself to Government's exhibit 1, is there a form 127 in the file which is marked, "Received by local board No. 58 March 5, 1970"?

A No, there is not.

MR. CARROLL: The problem, your Honor, is the receipt of the form 127 was not noted in [40] the minutes of action of the local board. There seems to be a problem there.

THE COURT: That would be a third 127 form?

MR. CARROLL: That's a current information questionaire.

THE COURT: Yes. But there were receipts of those forms indicated on the record for one received in February of '69 and one prior to that.

MR. CARROLL: Yes.

THE COURT: So this would be the third so-called 127 form which was filed?

MR. CARROLL: That's correct.

Q Do you have that form before you?

A Yes, I do.

Q Now referring yourself to series 7, part 2, was there any response to that question by the registrant?

A Yes, there is.

Q What is the response?

A "Hip pelvic operation."

Q Could you please read the statement in the form 127 directly prior to that response? That's series 7, part 2.

A You want me to read part 2?

[41] Q Yes.

A It says: "If you have any physical or mental condition which in your opinion will disqualify you for service in the Armed Forces, state the condition and attach a physician's statement if not previously submitted."

Q Referring yourself to DD form 47 filed on January 13, 1971, which is in the file marked Government's exhibit no. 1—do you have that form before you?

A Yes, I do.

THE COURT: What's that form number?

MR. CARROLL: That's a DD form 47.

Q Could you please read item 16A for the benefit of the Court?

A 16A states: "List all defects and diseases claimed by the registrant and any defects or diseases which the

registrant may have and which are known to the local board."

Q What was the response?

A "None."

THE COURT: Is it just blank, or did he say, "None"?

THE WITNESS: No, none.

Q I refer you back to the form 100.

THE COURT: What's the date of that DD form 47?

[42] MR. CARROLL: That was January 13, 1971.

Q I refer you back to the form 100, classification questionaire. I refer you to series 8. Could you please read the statement in small type under series 8?

A It states: "Claim to be a conscientious objector by reason of my religious training and belief and therefore request the local board to furnish me a special form for conscientious objector, SSS form 150."

Q Was there any response?

Was that section signed?

A No, it was not.

THE COURT: What did you ask, if that section was signed?

MR. CARROLL: Yes.

Q I refer you back to the minutes of action of the local board to February 18, 1971, and I ask you whether you received any document from the registrant on that date?

A Yes.

Q Do you have that document before you?

A Yes, I have the document before me.

Q Could you please read that?

A It's addressed to local board 50. It states: "In relation to an order of induction to the Armed Forces of the United States scheduled for February 24, 1971, I would [43] like to request a C.O. form 150."

Q Was any action taken by the local board pursuant to that letter?

A Yes.

Q Could you please tell me what that action was?

A Our New York City headquarters was contacted.

Q I'm asking you, pursuant to the letter that was filed on February 18, 1971, which was dated February 17 of 1971, was any action taken?

A No, there was nothing taken at that time.

Q Now on February 23, 1971—

THE COURT: That was a letter, if I follow you, to the local board by the registrant dated February 17th?

THE WITNESS: That's right.

THE COURT: It's his letter dated the 17th?

THE WITNESS: It's dated February 17. It was received by the local board February 18, 1971.

THE COURT: That was subsequent to the day he was to report for induction?

THE WITNESS: That's correct.

MR. CARROLL: Excuse me, your Honor. [44] That was subsequent to the date of the—that the induction order was sent out. The date he was supposed to report for induction was February 24th.

THE COURT: Right. I'm sorry. What I meant was subsequent to the date of the induction notice, not the date he was to be inducted.

Q Referring yourself to a report of information form SSS form No. 119 filed on February 23, 1971, do you have that form with you?

A Yes, I do.

Q Could you please read that form to yourself, please?

A (Witness complies.)

[45] Q Do you have any personal knowledge of the transaction that occurred in this particular instance?

A Yes.

Q Did you see the registrant yourself on that day?

A Yes, I did.

Q Could you please tell me from your own recollection what occurred on that date?

A Well, the registrant came into the local board and he had followed his request and I turned the registrant over to my assistant to complete action.

Q Is that the only contact that you had with the registrant on that date?

A No. The clerk submitted the form 119—you know, submitted the information to me in regards to what the

registrant wanted and I instructed her to contact New York headquarters, which he did, had her make up the report of information.

Q Could you please read from the report of information form 119?

A In its entirety?

THE COURT: Is that what you want, the whole thing?

MR. CARROLL: Yes. It's very short.

[46] A It states: "contacted New York City—"

THE COURT: Are we now talking about the same one you were referring to a moment ago?

THE WITNESS: That's correct.

THE COURT: What's the date of that?

THE WITNESS: It's dated February 23, 1971. "Contacted New York City headquarters, spoke to Mrs. Broadhurst, Legal Division, informed her that registrant reported to this local board and requested a C.O., SSS form 150; also informed her that registrant is under an outstanding induction for February 24, 1971. Mrs. Broadhurst instructed to have registrant write a statement as to the type of beliefs he has and what are they based on. In this order they could determine if the registrant wanted a postponement of his induction. Registrant wrote a statement which I read to Mrs. Broadhurst. Mrs. Broadhurst conferred with Major Maher, who in turn, denied registrant's request for postponement of induction. Mrs. Broadhurst instructed to issue registrant SSS Form 150 and letter directing the registrant to report for induction on February 24, 1971 as ordered. Mrs. Broadhurst dictated the letter [47] that is to be issued to registrant." Signed by clerical assistant to the local board.

Q Is this short note dated February 23, 1971 signed by the registrant, Ronald Jenkins, which states: "I am requesting a C.O. 150 form on the grounds that I am morally opposed to the present war and on these moral grounds, I don't feel that I could take part in any effort which would or could in any way perpetuate this war"? Is that a statement that the registrant submitted on that date?

A Yes.

Q Mrs. Morris, have you had in your duties with the local board any prior experience with individuals requesting a C.O. form 150 after they had received an induction notice, but before their date of induction?

A Yes.

Q Was it the usual practice for you to have these individuals write a short statement of their beliefs?

MR. WARBURGH: Your Honor, I'm going to object to that question. I don't think it's an issue before the Court at this time.

THE COURT: If she knows, I will let her answer. There is no jury here.

A Well, after a registrant—

THE COURT: Of course it's immaterial to [48] the issues here. It's not relevant to the issues in this case, what she has done in others. If you want me to know about it, I will be glad to know about it. I am just wondering what the relevancy is to the issue involved.

MR. CARROLL: I think I will be able to tie it up.

THE COURT: I will give you some latitude if you wish to develop that, if you wish.

What is the usual custom when you receive a notice requesting a form 150, subsequent to the date that the notice of induction is issued, and prior to the date of induction?

THE WITNESS: We contact our New York City headquarters and they, in turn, issue the instructions to us.

THE COURT: Is that what you did in this instance when you read from the form 119?

THE WITNESS: Yes.

Q Did you in fact give the registrant the form 150?

A Yes.

Q Can you tell from the minutes of action of the local board when the form 150 was received?

[49] A On March 30, 1971.

Q Did the local board take any action pursuant to this receipt of form 150?

A No, because the local board didn't have any jurisdiction at the time.

THE COURT: That was after March 30th, when you received the 150. Now prior to that time, on February 23rd, if I understood you correctly, you were talking to a Mrs. Broadhurst over the telephone at the New York City office?

THE WITNESS: That's correct.

THE COURT: You read his short statement with regard to his beliefs?

THE WITNESS: That is correct.

THE COURT: And did I hear you say something that somebody there denied it?

THE WITNESS: A request for postponement.

Q Referring your attention to SSS form No. 150, which I think you have before you, can you please read these words at the top ?

A It says: "Complete and return within 30 days."

Q Mrs. Morris, after the registrant submitted to you his statement on February 23 of 1971, prior to the receipt of the form 150, did you receive any other [50] correspondence from the registrant?

A Yes. Prior to February 23rd, you state?

THE COURT: Prior to March 3rd—

Q Prior to your receipt of the form 150 from the registrant, but after February 23 of 1971, did you receive any other correspondence from the registrant?

A Yes, I received a letter.

Q Could you please read that letter for the benefit of the Court?

THE WITNESS: Bear with me. They are not in order after all this time.

THE COURT: Especially after this questioning.

Q Just read the first paragraph.

A It states,—it's addressed—

THE COURT: The date first.

THE WITNESS: It's dated March 4, 1971, it's addressed to Major Maher and it states:

"The C.O. 150 form which I have requested is on the grounds that I am morally opposed to all wars and on these moral grounds I could not take part in any effort which would or could possibly in any way help perpetuate any war."

MR. CARROLL: All right, I have no [51] further questions.

THE COURT: Miss Morris, the minutes of action of September 27 indicate that you sent out a form 156 on that date requesting the submission of medical evidence in one week, etcetera.

THE WITNESS: That's correct.

THE COURT: You said that you received no answer from the registrant but you received a letter from the mother with a clinic card?

THE WITNESS: Yes.

THE COURT: What was the date of that letter from the mother?

THE WITNESS: We received it on October 5th. Her letter is dated October 4, 1966.

THE COURT: Dated October 4, '66?

THE WITNESS: That's correct.

THE COURT: Now, the clinic card which was attached is that from a hospital, the clinic from some hospital, or is it any particular place?

THE WITNESS: The card stated Vanderbilt Clinic.

THE COURT: What's the date of that card?

[52] THE WITNESS: The only information that we recorded from the card is the date of the last appointment and it was only one appointment and that was July 2, 1965.

THE COURT: '65?

THE WITNESS: That's correct.

THE COURT: You were asked by Mr. Carroll if you answered her letter and you said that there was no answer.

THE WITNESS: No, there wasn't.

THE COURT: The letter didn't ask, did it, for anything from you; it just explained the reason for the delay that might be necessary in producing other medical reports; isn't that right?

THE WITNESS: That's correct.

THE COURT: In other words, the mother wasn't asking for the board to write her for any particular purpose?

THE WITNESS: No.

THE COURT: She was just saying that was the reason for her delay and she wanted you to know that there was anything in Brooklyn or Manhattan, to write to her?

[53] THE WITNESS: That's correct.

THE COURT: But that wasn't for you to go out and look for something in Brooklyn or Manhattan to write her about, was it?

THE WITNESS: No, it wasn't.

THE COURT: That 127 form—I see there were three. Each one of them says state your condition, etcetera, medical or otherwise and submit proper forms.

THE WITNESS: That's correct.

THE COURT: You never received anything except thereafter the Presbyterian Hospital letter; is that right?

THE WITNESS: That's correct.

THE COURT: And they attached to their letter a photocopy of a report which is dated back to 1965?

THE WITNESS: That's right.

THE COURT: What was the date of the letter from the hospital?

THE WITNESS: The letter is dated January 26, 1971.

THE COURT: Is there anything in that letter other than just a statement that they [54] are attaching the hospital record?

THE WITNESS: That is correct. As well as they stipulated that they have only seen the registrant on the one occasion.

THE COURT: On one occasion, which was in 65?

THE WITNESS: That's right.

THE COURT: Look at that report, what was that one occasion they saw him?

THE WITNESS: They made mention — well, they made mention of the fact that they were enclosing the photostatic copy of a letter dated July 14, 1965 which summarized the patient's case.

THE COURT: That letter was signed by whom?

THE WITNESS: It was signed by—

THE COURT: Not the one you are looking at; the one they are enclosing.

THE WITNESS: Signed by the Assistant Vice President, Medical Information, Joseph E. Schneider, Medical Doctor.

THE COURT: Is there anything in that report which indicates what the final diagnosis [55] was as of the date of that letter?

THE WITNESS: Yes. It states the diagnosis was deformity of the left hip due to acute suppurative arthritis.

THE COURT: What was the date of that?

THE WITNESS: Registrant was admitted — first seen at their orthopedic hospital and was admitted on June 29, 1949 and discharged on September 6, 1949.

THE COURT: Was the operation performed within those days?

THE WITNESS: Yes, it was.

THE COURT: And he was discharged when?

THE WITNESS: September 6, 1949.

THE COURT: From that day on, does that record of the hospital show they saw him a number of times?

THE WITNESS: Yes, it does.

THE COURT: And they saw him up to when?

THE WITNESS: June 25, 1965.

THE COURT: And on June 25, was he discharged or did he just stop going there?

THE WITNESS: He just stopped going.

THE COURT: Is there anything in there [56] which would indicate? Is there in there to indicate when he last was there for examination?

THE WITNESS: A covering letter from the Presbyterian dated—

THE COURT: Not the letter. On the report.

THE WITNESS: No, there isn't anything here at all.

[57] THE COURT: The date of discharge is June of '65—I mean June of '49.

THE WITNESS: He was admitted to the hospital on June 29, '49. He was discharged on September 6, '49.

THE COURT: Thereafter I guess he was coming into their outpatient clinic?

THE WITNESS: I don't know. The only thing the letter states is they were attaching a copy of the X-ray report taken on June 25, 1969.

THE COURT: May I see that, please?

(Documents handed to Court.)

THE COURT: The letter signed by Dr. Joseph E. Schneider dated July 14, which was his letter to a Dr. Maurillo, states: "In answer to your recent inquiry, the above-named patient has been followed here since 1949. He was first seen at our New York Orthopedic Hospital and was admitted on June 29, 1949, and discharged on September 6, 1949. While admitted he underwent an incision and drainage of the left hip. The diagnosis was deformity of the left hip due to acute suppurative arthritis. He has been [58] followed here since then and when seen in orthopedic clinic on June 24, 1965, he had become asymptomatic and participated in activities in soccer and track. Within the past several months, however, he had developed pain in both knees, especially with climbing stairs. Range of motion of the hips revealed flexion on right 135, left 135."

The rest, I guess, is of no significance to us here.

Now, looking at the Presbyterian Hospital report, Department of Radiology, dated June 25, 1965, X-rays were taken of both knees and the impression, after examination, is as follows:

"Essentially normal knees."

Thank you, Miss Morris. (Handing.)

That letter was written by the hospital officer, Dr. Romillo. Was that part of the information that was sent to you by the hospital?

THE WITNESS: Yes.

THE COURT: Is Dr. Romillo attached to the local board?

THE WITNESS: No, he is not.

THE COURT: I am trying to ascertain [59] why the letter to him. Did that come to you through the hospital record?

THE WITNESS: This all came together.

THE COURT: Was that set of papers from the hospital sent to you at your request or did it come to you at the request of somebody else, that information?

THE WITNESS: It would be at the request of somebody else.

THE COURT: You just received this?

THE WITNESS: That's correct.

THE COURT: All right.

MR. WARBURGH: Your Honor, I just have a few questions on redirect.

REDIRECT EXAMINATION

BY MR. WARBURGH:

Q Miss Morris, after the local board received the letter from the defendant's mother in 1966, what classification was the defendant placed in?

A He was placed in class 2-S.

Q And directing your attention to—

THE COURT: That's already been elicited. He was placed in 2-S classification on three separate occasions subsequent to then, in '67, [60] '69 and '69, and then on November 18, 1-A.

Q Directing your attention to the material that was sent to the local board from the AFES station Armed Forces, is there anything in the reports that were sent by the AFES station that indicated that the defendant had noted anything concerning a hip condition?

A Yes.

Q Is there anything in those papers that indicates whether or not the doctors noted this hip condition?

A Yes.

Q What is that notation if you can read it?

A Well, the first word is "Had."

Q "Had." And the second word appears to be undecipherable.

A The third word is "surgery."

Q At the—"of one year." Is that what it indicates?

A That's correct.

Q Was there any other notation made concerning the hip condition?

A Yes.

Q What notation?

A "Had," or the word—second word is not readable or [61] the third word. Then it says, "Surgery one year old."

THE COURT: It shows an awareness that they had seen and heard of the operation?

MR. WARBURGH: Yes.

I have no other questions.

THE COURT: Does that report indicate their findings with respect to the hip condition if they examined it?

THE WITNESS: Yes.

THE COURT: May I hear what they say?

THE WITNESS: At the time that—this all took place at the time of his physical examination and the statements we just read, and they put their stamp on the forms, stating that the registrant was advised to present medical evidence to support unverified ailments.

THE COURT: That was the examination—that was his physical examination and that was on January 20, 1971.

MR. WARBURGH: One more question.

BY MR. WARBURGH:

Q Did the examining station determine whether he was acceptable to be inducted?

THE COURT: She said that earlier, as a [62] result of that.

Q As a result of the examination?

A Yes.

MR. WARBURGH: I have no other questions.

THE COURT: Anything else, Mr. Carroll?

MR. CARROLL: No further questions.

THE COURT: All right, thank you, Miss Morris.

(Witness excused.)

MR. WARBURGH: Your Honor, the Government would call as its next witness Mr. Thomas Maher.

[63] THOMAS MAHER, called as a witness on behalf of the Government, after having been first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. WARBURGH:

Q Mr. Maher, what is your present occupation?

A I am an Assistant United States Attorney in the Eastern District of New York.

Q Mr. Maher, in January and February and March of 1971 what was your occupation at that time?

A I was employed by Selective Service Headquarters, State Headquarters in New York City as Chief of the legal division in New York City headquarters.

Q In connection with your official duties during that time period did you have occasion to become involved in the case concerning Ronald Jenkins?

A Yes, I did.

MR. CARROLL: Your Honor, may I note an objection at this point, particularly I did not know that Mr. Maher would be called as a witness.

THE COURT: You certainly did. Didn't I tell you that that was one of the reasons why [64] I was granting your motion to ask Mr. Maher to be relieved?

MR. CARROLL: Yes. I knew that there was always the possibility that Mr. Maher would be called as a witness.

THE COURT: In fact—

MR. CARROLL: But I excluded my witnesses at the start of the case.

THE COURT: Is that what you are driving at, that he was here?

MR. CARROLL: Yes. And I just claim—

THE COURT: In what way do you think that prejudiced you? Miss Morris did nothing more than just testify from what appeared on the record, which could all have been done, by the way, without even asking her a question, because the whole file went into evidence and I could have read that record the same as she read it

to us, so I don't know where the prejudice is in his being here that time.

MR. CARROLL: Yes. I see, your Honor. But I still just claim as a matter of fundamental fairness that the Government should also exclude witnesses.

[65] THE COURT: Yes, I agree with you.

First of all when you asked your witnesses to leave, you might just have well have suggested to Mr. Warburgh that he do the same, and he didn't, and I would have done the same thing for him as I did for you, but it's done now, and are you making any point of it now beyond that?

MR. CARROLL: No. I just wanted my objection noted for the record.

MR. WARBURGH: May I say, Mr. Maher, sitting at the counsel table, his presence was in the nature of a case agent that the United States Attorney has a right to have in the courtroom at all times during the trial of a case.

THE COURT: Well, that's also discretionary with the Court. I exclude case agents too, until they testify and then I let them come back and sit at the counsel table. But I don't see where there has been any prejudice here and no request was made of the Court to exclude him.

Q Mr. Maher, in connection with this case of Ronald Jenkins, in February of 1971 was your office contacted by Local Board No. 50?

[66] A Yes, they were.

Q Can you tell the Court what that contact involved, in other words, what information they wanted?

A The local boards throughout the City were advised by New York City headquarters that any time a post-induction claim for conscientious objection was made, that our office was to be advised for whatever instruction might then follow.

Q In connection with the Jenkins' case, the local board contacted your office in accordance with those instructions?

A That is correct.

Q Did the local board advise you that the defendant was claiming that he was a conscientious objector?

A That is correct.
Q This was after he had received his induction notice?
A That is correct.
Q What were your instructions to the local board concerning this defendant?
A Not to postpone the induction. I derived authority from the New York City director to exercise his authority with regard to these type case questions.
Q Was this fact communicated to Mr. Carroll, [67] who is the attorney for Mr. Jenkins?
A I recall at some time, either in February or March, Mr. Carroll had contacted me and I advised him that we were not postponing the induction and that the induction order remains outstanding.
MR. WARBURGH: I have no other questions, your Honor.
THE COURT: Mr. Carroll, you may inquire.

CROSS EXAMINATION

BY MR. CARROLL:

Q Mr. Maher, referring your attention to the report of information form filed on February 23, 1971, could you read that form to yourself or if you have already read it, you don't have to.
A Yes.
Q Is that a fair and accurate record of what occurred on that date?
A I believe it is, yes.
Q From your own personal recollection, do you recall anything else that transpired on that date?
A I recall receiving a telephone call from you.
Q Now referring yourself to what occurred when you spoke to the agents of the local board, do you recall anything else that occurred with regard to that?
[68] A With regard to—
Q With regard to your conversation with Mrs. Broadhurst who was speaking to Mrs. Montana, the clerical assistant in the local board.

A I don't recall giving any further advice or instructions to the local board other than there would be no postponement of induction.
Q Did you in fact give that order that there would be no potsponement of Mr. Jenkins' induction?
A Yes.
Q Did you confer with the New York City Selective Service headquarters, director, Mr. Paul Akst?
A Yes, I had on this matter and similar matters.
Q Was it in fact Mr. Akst who gave the direction not to postpone the induction?
A It was his authority that I was exercising with his permission, his authority.
THE COURT: I assume you have that authority without calling him on every case?
THE WITNESS: That's correct.
THE COURT: You did not call him specifically on this case?
THE WITNESS: I might have brought this specific case to his attention.
[69] THE COURT: But you nevertheless had overall authority to exercise in your position?
THE WITNESS: Yes, your Honor.
Q Had similar cases in which an individual had claimed to be a conscientious objector after receipt of an induction notice but before the date of induction come to your attention?
A All post-induction claims for C.O. had come to my attention.
Q What was the usual procedure when you received notice of post-induction C.O. claims?
A To consider whether or not to grant the postponement of the induction, if it was necessary, if a postponement of the induction was necessary.
Q What type of considerations entered into your determination as to whether to postpone the induction or not?
MR. WARBURGH: I am going to object to this question. I don't think it's relevant.
THE COURT: I know. He knows. He's been doing it.

A Well, considerations were, of course, that if an induction order was postponed and somebody else was going to be called in this fellow's place, and bearing in mind the [70] Second Circuit's decisions in these cases of post-induction claims, that if the postponement of the induction was denied and the registrant had failed to report for induction, the local board could still consider the claim. They weren't precluded from considering the claim. In some cases, postponements were granted and in some cases they were not.

The reasons why some were not granted and some were granted—I can go into it if you wish.

MR. CARROLL: I am interested in the particular case here.

[71] Q Why was Mr. Jenkins' request for postponement not granted?

A Well, we had received—as I recall, we had received a call from the local board on February 23, 1971, on the eve of the induction, and we had asked the clerk to have the registrant make a statement with regard to his claim and if the statement on its face would require or set forth a prima facie claim for conscientious objection appeared that way, we would grant a postponement. However, we still bore in mind that even if we had not granted a postponement, the local board was not going to be precluded from reviewing the matter.

Q Was the fact that the local board was not precluded from reviewing the matter brought to the attention of Mrs. Montana in your conversation with her?

A Thereafter, as you know, they were precluded by the Supreme Court and the other decisions.

MR. CARROLL: We can take judicial notice of the Ellert case was rendered on April 21, of 1971 after all of the transactions.

THE COURT: Let's get into that when it comes time to discuss the law in the case because there are several cases that are very important after that, too.

[72] Q Did you receive any other correspondence from Mr. Jenkins with respect to his C.O. claim?

A Did I receive any other correspondence?

Q Yes.

A I don't recall.

Q I'm referring your attention to the letter dated March 4, 1971.

A Yes.

Q I don't think I got an answer to that question.

What was the reason that Mr. Jenkins' postponement was denied?

A Because out of consideration for those people who would be called in his place, we didn't feel a postponement of his induction was warranted.

Q But you stated that you had postponed other individuals from induction who had made post-induction C.O. claims.

A Yes. When they made a statement that on its face appeared to warrant a postponement.

Q What was it on the face of Mr. Jenkins' statement that you felt did not warrant a postponement of his induction?

A It appeared on its face that he was opposed to a [73] particular war.

Q Did you receive a letter from Mr. Jenkins which I just referred to which is dated March 3, 1971?

A I don't recall receiving it, but I may have.

Q Well, could you read the first paragraph of that letter?

THE COURT: Is it in Exhibit 1?

MR. CARROLL: Yes.

A The CO150 form—it's dated March 3, 1971 and it reads:

"The CO150 form which I have requested is on the grounds that I am morally opposed to all wars and on these moral grounds I could not take part in any effort which would or could possibly in any way help to perpetuate any war. I would also like to inform you that I am now in the process of competing CO form—"

I am sorry. This is the second paragraph.

Q Right. I just want you to read the first one.

A All right, I read the first one.

MR. CARROLL: I had no objection to it.

THE COURT: That was dated when?

THE WITNESS: March 3, 1971.

THE COURT: That was subsequent to the time that you had given the order not to postpone. That was February 23rd, if I recall?

[74] THE WITNESS: That is correct.

Q Did you take any action pursuant to that letter?

A Yes.

Q What action did you take pursuant to the letter?

A As I recall, the letter was brought about by a conversation had between yourself and myself. I think I made mention to you at that time why we were not postponing the induction, the response to that letter was received. The action we took then was to call in the file to New York City headquarters, and I advised you that the matter would not be reported to the U.S. Attorney until the case was reviewed, and that thereafter New York City headquarters could take action if we determined that the matter, the case warranted the attention of the local board, the New York City Director could and would re-open the classification and cancel the induction order.

Q Was this case referred back to the local board No. 58?

A I think it was in August of 1971 the case was returned to the local board and we advised the local board to report the matter to the U.S. Attorney for his consideration and the State Director chose not to cancel the induction order or to re-open and have the local board consider the matter.

MR. CARROLL: All right, I have no further [75] questions.

MR. WARBURGH: Just one question on redirect.

REDIRECT EXAMINATION

BY MR. WARBURGH:

Q Mr. Maher, if Mr. Jenkins had submitted to induction and had been inducted, would the Army have considered his conscientious objector claim?

A If he made his claim to the Armed Forces at that time, they would have considered his claim.

MR. CARROLL: Excuse me, I will have to object to that.

MR. WARBURGH: No further questions.

THE COURT: Is that the normal procedure?

THE WITNESS: Yes, sir.

THE COURT: In other words, every claim is reviewed.

THE WITNESS: That is correct, your Honor.

THE COURT: And the 150 form was reviewed when?

THE WITNESS: In March of '71.

THE COURT: Subsequent to the date that he was supposed to be inducted?

THE WITNESS: That is correct.

THE COURT: When papers are sent in after [76] a person is inducted, do they go on to where he has been sent?

THE WITNESS: No, your Honor. It would be up to him to make his claim within the Armed Forces. If I may add, your Honor—and of course you are free to object to this—had the local board at that time in February, March of '71 passed on the merits of the claim of conscientious objection, then, as I recall the Army regulations at the time, they would have to have taken into consideration that this claim was already determined by Selective Service, if they had denied the claim.

THE COURT: That was the situation here.

THE WITNESS: That was the situation in, as I recall, February of '71, March of '71.

THE COURT: All right, you may step down.

(Witness excused.)

THE COURT: Anybody else, Mr. Warburgh?

MR. WARBURGH: No, your Honor. The Government rests.

THE COURT: We will go out to lunch and come back.

MR. CARROLL: Fine. I just want to state [76a] at this time I made a motion for judgment of acquittal, but I would like to reserve that until the close of my case.

THE COURT: First thing after lunch I was going to ask you if you had any motions. So you can repeat that, then. Be back at 2:00 o'clock.

(A luncheon recess was taken.)

[77] AFTERNOON SESSION

(2:15 o'clock p.m.)

THE COURT: All right, the case on trial.

MR. CARROLL: Could we have a very brief recess?

THE COURT: Mr. Carroll, we have been in recess for an hour. You mean to talk to me?

MR. CARROLL: No, sir. I just have to leave the room for a few minutes.

THE COURT: Oh, I am sorry.

(A recess was taken.)

MR. WARBURGH: Your Honor, I would move to re-open the Government's case for the purpose of introducing into evidence Government's Exhibit 2 for identification.

THE COURT: Is that the blank?

MR. WARBURGH: That's the blank, yes.

THE COURT: Do you need it? It's the classification card.

MR. WARBURGH: That's the classification card which indicated appellant's rights.

THE COURT: Only for the purpose of indicating it's a similar form.

MR. CARROLL: I have no objection.

THE COURT: Government's Exhibit 2 for [78] identification received in evidence.

(So marked.)

THE COURT: Motion of Mr. Warburgh to re-open is granted. Government's Exhibit 2 for identification is received in evidence, and now do you rest again?

MR. WARBURGH: Yes, the Government rests.

THE COURT: Your turn, Mr. Carroll.

Do you want to make any motions now at the close of the prosecution?

MR. CARROLL: No. I would like to reserve my right to make motions.

THE COURT: Defendant reserves all rights for all motions ordinarily made at the close of the prosecution's case, and you may proceed with your defense.

MR. CARROLL: Initially, the first witness we are going to call is the defendant, Ronald Jenkins.

Mr. Warburg and myself stipulated to the truthfulness of Mr. Jenkins, thereby obviating the need to call three character witnesses that we had to testify in Mr. Jenkins' behalf.

I would like to call at this time Mr. Jenkins.

[79] MR. WARBURGH: So the record will indicate; the Government will stipulate to the defendant's good character.

THE COURT: All right. Did you have particular witnesses that you were going to bring in?

MR. CARROLL: Yes.

THE COURT: Why don't you bring in those you had intended to call, X, Y, Z, as character witnesses and to obviate the necessity of their personal appearance, the Government has conceded that, should they be called, they would testify as to his character, relative character traits.

MR. CARROLL: We had three character witnesses, your Honor: Reverend Andre Diaz, who is the Pastor of the Cuyler Warren Church.

We also had Captain Theodore Williams, who is an ex-Marine, who is presently working at the Morgan Guaranty Trust Bank in New York, and Mr. Edwin Lawrence, who is a retired fireman, who is also a member of the New York City Metropolitan Committee on Conscientious Objectors.

These three witnesses would have testified as to Mr. Jenkins' truth and veracity in the [80] community.

THE COURT: Is that correct?

MR. WARBURGH: Your Honor, the Government—

THE COURT: They would have testified to that?

MR. WARBURGH: I assume they would have testified to that.

THE COURT: That's what he says. That, of course, I understand, is agreed to by you without necessarily agreeing as to whether or not those are going to be binding upon any decision in this case.

MR. WARBURGH: That's right.

THE COURT: In other words, they will be received like we do in any ordinary trial, as character witnesses, which witnesses will be accepted—like their testimony will be accepted like all testimony and considered evidence in the case, right?

MR. WARBURGH: Yes, your Honor.

THE COURT: So long as we understand each other. Off the record.

(Discussion off the record.)

[81] MR. CARROLL: The defense calls as its first witness the defendant Ronald Jenkins.

THE COURT: Come forward, Mr. Jenkins.

RONALD JENKINS, called as a witness in his own behalf, after having been first duly sworn by the Clerk, testified as follows:

THE CLERK: State your name for the Court Reporter and your address.

THE WITNESS: Ronald Jenkins, 107 Van Brunt St. Brooklyn, New York.

THE COURT: Before he testifies may I talk to you, Mr. Carroll, and you, Mr. Warburgh?

This doesn't have to be on the record.

(Discussion off the record.)

(A recess was taken.)

MR. CARROLL: We are going forward.

THE COURT: All right, come forward, both of you. May the record indicate that the reason for the delay was my desire to call up the attorney for the defendant to again discuss this case with his client from the point of view of possibly trying to dispose of it, which is not my practice to get involved in any kind of bargaining,

but I [82] felt that in view of the law that surrounds this type of a case, I thought that Mr. Carroll ought to again talk to his client. He advised me that he had already previously to then talked to his client and his client insisted on trying this case, and now I understand that he still wishes to go forward, right?

MR. CARROLL: Yes, sir.

THE COURT: All right. So let's go, so long as we understand.

THE CLERK: Will you take the stand, please?

THE COURT: You may proceed, Mr. Carroll.

DIRECT EXAMINATION

BY MR. CARROLL:

Q Mr. Jenkins, what is your occupation, for the record?

A I am a postal employee.

Q Where are you working?

A At Peck Slip Station.

Q Do you have any prior convictions?

A No, I don't.

Q Now directing your attention to in or about September 1966 did you have the occasion to go to Local Board No. 50?

[83] Q What did you do at that time?

A I registered.

MR. CARROLL: This is a copy of Government's Exhibit 1, the classification questionnaire.

Q I direct your attention to Series No. 8 which states: "I claim to be a conscientious objector by reason of my religious training and belief and, therefore, request the local board to furnish me a special form for conscientious objector, SSS form No. 150," and I ask you whether you signed that form?

A No, I did not.

THE COURT: What you read, was that in Mr. Jenkins' handwriting?

MR. CARROLL: Yes.

Q Is this a true and accurate representation of the classification questionnaire that you filled out in September of 1966?

A Yes, it is.

Q And this is your handwriting?

A Yes.

THE COURT: You said you did not sign it?

THE WITNESS: No, I didn't.

May I say something?

Q If you want to say something in response to the [84] question—

THE COURT: I don't know if it's in response to the question, but maybe you can go to him, talk to him. I don't mind if you talk to him.

Off the record.

(Discussion off the record.)

Q Directing your attention to February of 1971, did you receive an order to report for induction?

A Yes.

Q Did you do anything in response to that order to report for induction?

A I requested Form 150.

MR. WARBURGH: I am sorry. I didn't hear the answer.

THE COURT: Yes, you have to speak a little louder, Mr. Jenkins.

Did you receive an order for induction?

THE WITNESS: Yes, I did.

THE COURT: Then your next question was?

MR. CARROLL: Did you do anything in response to that order to report for induction?

THE WITNESS: I requested a Form 150.

Q Before you requested a Form 150, but after you received the induction order, did you do anything else in [85] response to the receipt of that induction order?

A I asked for a postponement of the induction order.

Q Was that on your own volition or had you spoken to somebody about that?

A About the postponement?

Q Yes.

A Yes, I had.

THE COURT: Yes, you had what?

THE WITNESS: Spoken to someone about postponement.

Q Did you ever speak to Mr. Jerome Bibuld?

A Yes.

Q You spoke to him about your induction order?

A Yes.

Q Was this pursuant to the induction order that you spoke to Mr. Bibuld?

A Yes, it was.

THE COURT: Who is this Mr. Bibuld?

Q Could you please identify Mr. Jerome Bibuld?

A He is draft counselor, he works in Bedford-Stuyvesant.

THE COURT: Not in your local board?

THE WITNESS: No.

THE COURT: This is a local community office that helps on draft matters?

[86] THE WITNESS: Yes.

THE COURT: Not an official body?

THE WITNESS: Not of Selective Service.

Q When did you see him?

A In February.

Q This was after you received the induction order?

A Yes, it was.

Q Could you please tell us what transpired when you saw Mr. Bibuld?

A Well, we did, you know, the usual questions, information that I related to the induction order and during the course of our discussion the matter of conscientious objection, you know, was brought to my attention. Prior to that time I wasn't aware of the definition for conscientious objection nor of my rights under the Selective Service laws.

Q Prior to speaking to Mr. Bibuld had you identified yourself as being opposed to war in all forms?

A Not clearly, you know, but we did talk about certain things, you know, certain things were brought out and when—after which time when informed about the

definition of a conscientious objector, I felt that I fitted that definition, so I applied.

THE COURT: When was that conversation with [87] Mr. Bibuld?

THE WITNESS: This was in February, about February—

THE COURT: When did you receive your notice to report for induction? Also in February, wasn't it?

THE WITNESS: February 5th, something like that.

THE COURT: Did you go to the Board to inquire there about your notice of induction?

THE WITNESS: I went to the Board to check my records.

THE COURT: Did you tell them at that time anything or ask them any questions?

THE WITNESS: About my induction order?

THE COURT: Yes.

THE WITNESS: No, I didn't.

THE COURT: Did you ask them at that time to postpone your induction because you were going to make a claim for CO?

THE WITNESS: At or about that time I asked for Form 150.

THE COURT: When did you ask for the Form 150, before you spoke to Mr. Bibuld or after?

[88] THE WITNESS: After.

THE COURT: Well, I am trying to find out if you did anything along those lines before you spoke to Mr. Bibuld.

THE WITNESS: I was unaware of the conscientious objector classification before that time.

MR. CARROLL: I am going to refer Mr. Jenkins to certain documents that might help him refresh his recollection.

BY MR. CARROLL:

Q I refer you to United States Government memorandum filed on February 9, 1971, and I ask you whether this is your handwriting?

A Yes, it is.

Q Could you please tell the Court what the nature of this memorandum is by reading subject?

A "Review of Complete Selective Service Records."

Q I refer you to a current information questionnaire that was filed on February 9—

THE COURT: Before we pass the other one up, I would like to know more about it. Just a heading Review of Records means nothing to me.

Q Could you please explain to the Court what you [89] did—

THE COURT: What does it say on there? It's in evidence, you say?

MR. CARROLL: No. This is all that it says, "Review of Selective Service Records."

THE COURT: May I see it?

(Document handed to Court.)

THE COURT: Mr. Jenkins, is this part of Government's Exhibit 1?

MR. CARROLL: Yes, that's a copy.

THE COURT: This was written by you on February 9?

MR. CARROLL: Yes.

THE COURT: Where, at the Board?

MR. CARROLL: Yes.

THE COURT: Tell me what prompted you at the Board to write this?

Were you talking to someone at the Board and they told you to write this out or something?

THE WITNESS: I asked to see my file, to review it, and in order for me to see it they had to have that in writing.

THE COURT: Did you tell them why you wanted to see it?

[90] THE WITNESS: I belive so. I am not certain.

THE COURT: Do you know what you told them?

THE WITNESS: Just that I wanted to review my file.

THE COURT: Is that because you had received an induction notice?

THE WITNESS: No, it wasn't.

THE COURT: You had already received the induction notice?

THE WITNESS: Yes, I had.

THE COURT: Then tell me why you wanted to see the file.

THE WITNESS: I had not received a classification card as to being put in Class 1-A prior to or after my induction notice. So that was the reason.

THE COURT: That was the reason for it?

THE WITNESS: Yes.

BY MR. CARROLL:

Q Mr. Jenkins, I refer you to a copy of a letter which is in Government Exhibit 1 which is dated February 17, 1971 and I ask you whether this is a true copy of the letter that you wrote to the local board.

A Yes, it is.

[91] Q Could you please read this letter to the Court.

A "In relation to an induction order into the Armed Forces of the United States scheduled for February 24, 1971, I would like to request a CO Form 150."

THE COURT: What's the date of that letter?

MR. CARROLL: This letter is dated February 17 of 1971.

Q Did you receive any reply from the local board to that letter?

A No, I didn't.

Q Did you have any further contacts with the local board after writing that letter February 17, 1971?

A Yes, I did.

Q Now I show you a report of information form, a copy of a report of information form which is part of Government Exhibit 1 and I ask you to read that to yourself and tell me whether that's a true and accurate representation of what occurred on February 23 of 1971?

Do you recall those events?

A Some of them.

Q Would you like to add to those events in any way?

A No.

Q Did you receive a form 150 on that date?

A Yes, I did.

[92] Q Did you complete that form 150?

A Yes, it was completed.

Q On February 24 of 1971 did you go to the AFES station?

A No.

Q Is there any reason that you didn't go to the AFES station on that day?

A At that time I was in the process of completing my 150 form, which I had thirty days at face value on the form—it said that I had thirty days to complete it, so I was in the process of filling it out, and my conscientious objector claim had not been considered.

Q Are you referring to the statement at the top of the SSS Form 150 which states: "Complete and return within thirty days"?

A Yes.

Q Did you hear anything from the local board about the consideration of your conscientious objector claim?

A No.

Q Did you in fact receive a denial from the local board of your conscientious objector claim?

Did you receive any communication from them either affirmatively or negatively?

A I don't believe I received anything from them.

[93] THE COURT: You say that you took that form at face value and said because you can fill it out and send it in in thirty days, that anything else within that thirty days you didn't have to do?

THE WITNESS: No. I couldn't understand how my claim could have been considered, and at the same time accept induction.

THE COURT: But you don't know what the results of the consideration of that claim would have been at that time?

THE WITNESS: No, I don't.

THE COURT: In other words, you didn't go to the Board and say, "Look, I just got that form. I got thirty days to fill it out and I'm not going in because I want an extension until I get that filled out, or something like that"?

Did you tell them that? You just ignored the induction notice, right?

THE WITNESS: (No response.)

MR. CARROLL: I have to object to the form of that question. I think that's a conclusion.

THE COURT: I will ask it in a different form.

THE WITNESS: I didn't ignore it.

[94] THE COURT: Your lawyer objected to it so don't answer it. I want to ask it in a different form.

You received Form 150 and you took at face value the fact that you had thirty days within which to fill it out. At the same time you knew that your induction notice was for a date prior to that thirty-day period, right?

THE WITNESS: Yes.

THE COURT: Did you say "Yes"?

THE WITNESS: Yes.

Q Now, knowing that, did you go to the Board and say, "Extend my time to give me a chance to fill out out this 150 form"?

THE WITNESS: I did that in asking for the postponement.

THE COURT: What did they do?

When did you do that?

THE WITNESS: I asked for the postponement before the date of induction.

THE COURT: I'm not talking about that. You had gotten an induction notice and you say after that you went there and got a 150 form, right?

[95] THE WITNESS: Yes.

THE COURT: In other words, you got the 150 form to fill out after you had been notified that you were going to be inducted?

THE WITNESS: Yes.

THE COURT: That's what I am talking about.

Now, between that time when you got the induction notice and the time when you were to appear for induction, did you do anything at all, did you get that 150 form in even though you had thirty days?

You didn't do that, did you?

THE WITNESS: I did get the 150 form in.

THE COURT: When, after the induction date?

THE WITNESS: Are you saying that I should have—

THE COURT: I am not saying what you should have done. I am just trying to find out what you did.

In other words, the induction notice which you received said that you must appear for induction on what day?

THE WITNESS: On the 24th.

THE COURT: On February 23rd or 24th, whatever [96] it was. Let's say 24th. You received that on when?

THE WITNESS: February 23rd.

THE COURT: You got it the day before?

THE WITNESS: Yes, I did.

THE COURT: In other words, you say you got the notice to appear for induction on the 23rd to appear on the 24th, the next day?

THE WITNESS: I got the form on the 23rd.

MR. CARROLL: Referring to the form 150 form.

THE COURT: The 150 form?

THE WITNESS: Right.

THE COURT: When did you receive your notice to appear for induction on the 24th?

THE WITNESS: The 5th of February.

THE COURT: In other words, from the 5th of February to the day that you went for the 150 form on February 23rd you did nothing about that induction notice?

THE WITNESS: No.

MR. CARROLL: Excuse me. I object to that.

THE COURT: Why?

MR. CARROLL: Because the letter was sent [97] out—a letter was sent out to the local board on February 17, 1971.

THE COURT: Requesting a 150 form.

MR. CARROLL: Requesting a 150 form.

THE COURT: All right, that was after he had received the notice, right?

MR. CARROLL: That's correct.

THE COURT: So that on the 23rd you went down for the form yourself; is that what you did?

THE WITNESS: Yes.

THE COURT: But you had asked for it by this letter of February 17?

THE WITNESS: Yes.

THE COURT: When you got the form on the 23rd then what did you do about asking for a postponement?

THE WITNESS: I believe I contacted Mr. Carroll and I believe he contacted Major Maher.

BY MR. CARROLL:

Q Directing your attention to a letter which is dated February 23, 1971, is this a true and accurate copy of a letter that you submitted to the local board on that date?

A Yes.

Q This is in your handwriting?

[98] A Yes.

Q Could you please read that letter?

A "I am requesting a CO 150 form on the grounds that I am morally opposed to the present war and on these moral grounds I don't feel that I could take part in any effort which would or could in any way perpetuate this war."

Q Pursuant to whose request, if any, did you write that document?

A To the request of the Executive Secretary, Miss Elaine Morris, who I spoke to at that time.

THE COURT: That was on the 23rd.

MR. CARROLL: That was on the 23rd.

Q Is your objection in fact limited to the present war?

A No.

MR. WARBURGH: I am going to object to that.

THE COURT: Yes. The paper speaks for itself.

Did you tell the Executive Secretary, when you went down there and signed that requesting the 150 form, that you had written a letter to her on the 17th and you had not received anything from her?

THE WITNESS: Yes.

[99] THE COURT: What did she say to that?

THE WITNESS: She said that I have to sit down and write this out in order to get the form.

THE COURT: All right.

Q This letter has already been sufficiently discussed, but is this a true and accurate representation of a letter that you wrote on March 3, 1971?

A Yes, it is.

MR. CARROLL: That letter, your Honor, is the letter the registrant wrote which states that "The CO 150 form which I have requested is on the grounds that I am morally opposed to all wars and on these moral grounds I could not take part in any effort which would or could possibly in any way help to perpetuate any wars."

THE COURT: That was written what date?

MR. CARROLL: That was on March 3, 1971.

THE COURT: After the one that you read previously.

MR. CARROLL: That's correct. That was after the date of induction.

Q Referring your attention to the special form for conscientious objectors, form 150, which is part of the records, Series 1, could you state whether you signed Part A [100] or Part B of that series?

A Part B.

Q In signing Part B of that series, what was your understanding?

A That I would perform civilian service.

Q Did you answer the other questions on the Form 150 in full?

A Yes, I did.

MR. WARBURGH: I am going to object to this line of questioning. I think the form speaks for itself. It's in evidence.

MR. CARROLL: I just wanted to bring this to the Court's attention.

THE COURT: That's all right. I will allow it.

We permitted Miss Morris to read from letters on the same basis.

Q Now Mr. Jenkins, going back to the classification questionnaire that you filled out in September of 1966,

in answer to Series 11, physical condition, Section 2, where it's stated: "If you have any physical or mental condition which in your opinion will disqualify you for service in the Armed Forces, state the condition and attach a physician's statement," could you tell the Court how you answered that particular question?

[101] A "Hip operation."

Q Also Mr. Jenkins, referring your attention to Form No. 56 that was mailed from the local board to you, I will ask you whether you received a copy of that letter.

A Yes.

Q Do you understand what this letter says?

A Yes.

Q Now did you take any action pursuant to this letter which states, "Dear Sir: Because of certain physical defects claimed by you it is important that you submit to this local board any medical evidence you have concerning these defects which will aid the Armed Forces Examining Station in determining your physical status"? Did you take any action pursuant to that?

A I contacted my mother and asked her to comply with the letter for me.

Q Referring your attention to a form 127, current information questionnaire, which was received by the local board on October 23rd of 1967, in response to Series A did you respond to that in any way, subsection 2, asking if you have any physical or mental condition which in your opinion would disqualify you from service in the Armed Forces, state the condition and attach a physician's statement if not previously submitted?

[102] A No, I didn't.

Q Is there any reason why you didnt' fill out that particular section?

A I can't remember exactly what it was.

Q Referring your attention to current information questionnaire, Form 127, received by the local board on February 17 of 1969, and referring your attention to Series 7, subsection 2, which states as the previous question, did you respond to that in any manner?

A Yes, I did.

Q What did you say?

A "Hip pelvis operation."

Q Again, Mr. Jenkins, referring your attention to current information questionnaire filled out, returned to the local board by March 5th of 1970, in response to the Series 7, Subsection 2, did you state anything?

A "Hip pelvis operation."

Q Now Mr. Jenkins, did you receive in or around January of 1971 a Form No. 223 order to report for Armed Forces physical examination for January 20, 1971?

A Yes.

Q Did you in fact go to the AFES station on January 20, 1971?

A Yes.

[103] Q Was there any examination by the doctors at the AFES station performed upon you at that time?

A Yes.

Q Now could you please state for the benefit of the Court the examination that was given to your hip at that time?

A The examination—

MR. WARBURGH: I object to this as not being relevant to the issues on trial.

THE COURT: I am going to allow it. There is no jury here, so let me hear what he's got to say.

This is now his own description.

MR. CARROLL: Yes.

THE COURT: Of course, it's coming from one who doesn't know medical terms or anything like that.

MR. CARROLL: Yes. But just from his own personal observations.

THE COURT: The question of relevancy, of course, is still uppermost in my mind.

But go ahead.

A The examination took about two minutes. The doctor looked at the scar.

[104] THE COURT: Your clothes were off?

THE WITNESS: Yes.

THE COURT: And he looked at the scar?

THE WITNESS: He looked at the scar on my hip, my left hip, asked me to run down a corridor and back and that was the extent of the examination.

THE COURT: Did any doctor put his hand on your hip to feel it?

THE WITNESS: No.

THE COURT: Nobody touched your hip?

THE WITNESS: Just looked at it.

THE COURT: Just looked at it?

THE WITNESS: Yes.

THE COURT: Before asking you to run?

THE WITNESS: Yes.

THE COURT: You don't know what he was looking at; you say he looked at your scar?

THE WITNESS: He looked at the scar on my hip.

THE COURT: He looked at your hip, too?

THE WITNESS: Yes.

THE COURT: Had you submitted any records at that time with regard to your hospitalization?

THE WITNESS: No, I didn't, aside from the [105] letter that my mother wrote.

Q During that examination did you inform them at any time about your hip?

A Yes.

Q In what manner did you inform them about your hip?

A On a form that I had to fill out before the actual examination, also during the examination when I got to see the doctor and at the end of the examination.

MR. CARROLL: I have no further questions.

[106] THE COURT: Mr. Warburgh, your witness.

CROSS-EXAMINATION

BY MR. WARBURGH:

Q Mr. Jenkins, in September of 1966, after you had registered with the Selective Service System, you were subsequently classified 2-S?

A Yes.

Q Is that a student deferment?

A Yes.

Q Did you receive one of these cards or a card that looked like that, Government's Exhibit 2 in evidence?

MR. CARROLL: Will you please identify that card?

MR. WARBURGH: Government's Exhibit 2 in evidence.

THE COURT: That's the blank form.

Q Did you receive a card that looked like that with your classification on it?

A Yes, I did.

Q Did you read the card when you received it?

A I don't believe I did.

Q You didn't read the card?

A Except for the classification I had.

Q Well, would you read this portion of the card now? [107] Read it out loud.

A "The law requires you to have this notice in addition to your registration certificate in your personal possession at all at all times and to surrender it upon entering active duty in the Armed Forces. The law requires you to notify your local board in writing within ten days after it occurs of every change in your address, physical condition and occupation, including student, marital, family dependency and military status and of any other fact which might change your classification.

"Any person who alters, forges, knowingly destroys, knowingly mutilates or in any manner changes this certificate or wh ofor the purpose of false identification or representation has in his possession a certificate of another, or who delivers his certificate to another to be used for such purpose may be fined not to exceed $10,000 or imprisoned for not more than five years, or both."

Q Now, at the time that you registered with the Selective Service System in September of 1966, did you receive a registration card, your draft card, did you receive it?

A Yes.

Q Do you have it with you now?

A No, I don't.

Q After you were classified 2-S in 1966 you were [108] then classified 2-S in 1967; is that right, and

you received another card similar to this one with your classification on it?

A Yes, I did.

Q You received four of those classifications in class 2-S; is that right?

A Yes.

Q On each of those occasions you received a card like this with your classification on it?

A Yes.

Q Would you tell the Court when you left school?

A In May 1970.

Q Did you graduate from school at that time?

A No, I didn't.

Q During the time that you were at school you had told the local board that your address was your local address at school; is that right?

A Yes.

Q In May of 1970 you left school?

A And I also went back in September.

Q Of 1970?

A Yes. But I was not a student then. I was in the City of Greensboro at that time.

Q Did you inform the local board that you were [109] no longer a student?

A I had not made the final decision to leave school completely.

Q Just answer my question: Did you inform the local board?

A No, I did not. I was still a student—

Q No. Just answer my question.

Where did you live at Greensboro at that time?

A At the time I went back?

Q Pardon me?

A When?

Q In 1970.

A 101 South Davis St.

Q Did you subsequently return to New York?

A When?

Q Some time after that.

A Yes.

Q What date did you return to New York?

A After the semester was over; it was in May some time.

Q May of 1970?

A 1970.

Q Did you tell the local board what your address was in New York at that time?

MR. CARROLL: Objection. I object on the [110] grounds that this isn't an issue in the case.

MR. WARBURGH: Your Honor, there was some issue raised during direct examination as to the fact that he never received his A-1 classification card.

THE COURT: That's right. He so testified. I will allow it.

A I wasn't aware—

Q No. My question was, did you inform the local board of your New York address?

A Yes. The local board knew my New York address, 107 Van Brunt St., Brooklyn.

Q Then your testimony is that you went back to North Carolina in the fall of 1970?

A Yes, I did.

Q And that was not in the capacity of a student; is that right, you were not a student at that time?

A No, I was not enrolled at that time.

Q After the fall of 1970 did you return to New York?

A Yes, I did.

Q When did you return to New York?

A In or around about December 1970.

Q At that time did you inform the local board of [111] your new location; yes or no?

A No, I did not.

Q With respect to the events that took place in February of 1971 you received your induction notice on or about February 5, 1971?

A Yes, I did.

Q And then after that you went to the local board and asked that your induction be postponed; is that correct?

A No.

Q That's not correct?

A I wrote a letter to the board asking for a 150 form.

Q Prior to writing the letter did you go to the local board and ask that your induction be postponed?
A Prior to writing the letter or after writing the letter?
Q Prior to writing the letter.
A No.
Q On February 9, 1971, did you go to the local board on that day?
A Yes, I did.
Q At that time the local board gave you a Form 127, which is a current classification questionnaire; is that correct?
A Yes, it is.
[112] Q Did you throw that out?
A No, I didn't.
Q At that time, did you ask the local board to postpone your induction?
A No, I don't believe so.
Q When was it that you met with this draft counselor?
A Some time after I received the induction order.
Q Did you meet with him before you sent the letter requesting a Form 150?
A Yes.
Q Before you sent the letter requesting a Form 150 did you have any conversation or meetings with Mr. Carroll?
A Yes.
Q When was that?
A It was some time before or after I asked for the 150 form.
Q Before or after you asked for the 150 form?
A Yes.
Q When you went to the local board on February 23, 1971 did the local board tell you that your induction was not postponed?
A Yes.
Q Did you thereafter receive a letter telling you [113] that the induction was not postponed? (handing)
A Yes.

Q Who received that letter? Did you receive that letter on the 23rd of February?
A Yes.
Q Did Mr. Carroll tell you prior to February 24th that your induction would not be postponed?
MR. CARROLL: Objection. What I told Mr. Jenkins and what I didn't tell Mr. Jenkins is within the bounds of privilege.
THE COURT: Yes, except that Mr. Jenkins has taken the stand and he's testified to certain things, hasn't he?
MR. CARROLL: I think it's proper to testify that he had spoken to me, but as to the nature of what he spoke to me about or any conversations I think is within the bounds of privilege.
MR. WARBURGH: I will withdraw the question.
Q On February 23, 1971 you knew that your induction was not going to be postponed; is that correct?
A On February 23rd I knew, yes.
Q At the time you reported for your induction, [114] pre-induction physical examination, you told the examining doctors about this hip condition? Is that correct?
A Yes.
Q Did you also tell them that you had engaged previously in soccer activities?
A No.
Q In track activities?
A No.
Q In basketball activities?
A I never participated in basketball activities, not on no team.
Q Pardon me?
A Not on no team.
Q Have you ever played basketball?
A Yes, I have played basketball before in my life.
Q Did you play basketball while you were down at school in North Carolina?
A I was not on the basketball team.
Q I didn't ask you that. Just answer my questions. Did you play basketball while at the school there?
A Yes.

Q On February 24, 1971 did you report for [115] induction as directed?
A No.
MR. WARBURGH: No further questions.

REDIRECT EXAMINATION

BY MR. CARROLL:

Q Mr. Jenkins, did you ever go to any doctors with regard to your hip condition?
A No.
Q Did you ever consult with a Dr. Simons?
A Yes.
Q Did you go to Dr. Simons—
MR. WARBURGH: Could I ask when this took place?
MR. CARROLL: That was the next question.
THE WITNESS: This took place prior to my senior year in high school.
Q Did Dr. Simons examine you?
A Yes, he did.
Q How long did you see Dr. Simons about your hip condition?
A The exact amount of time I couldn't say.
Q Did Mr. Simons give you any advice as to physical activities?
A He told me—
[116] MR. WARBURGH: Objection.
THE COURT: Sustained.
Do you have any report of his?
MR. CARROLL: No, I don't.
Because this is when he was in high school.
I think, your Honor, the U.S. Attorney brought out the fact that Mr. Jenkins had played basketball and I think this is relevant to that particular question brought out on cross.
THE COURT: If you want to talk about playing, he didn't bring out anything about doctors at that time.
MR. CARROLL: It relates directly to that point.
THE COURT: While he was in high school?
When was he in high school?

MR. CARROLL: I think he stated he had seen the doctor over a period of time.
THE COURT: When was this that you were in high school?
THE WITNESS: 1963 through '66.
THE COURT: Your hip operation was back in 1949?
THE WITNESS: Yes.
[117] THE COURT: How old were you when you had your hip operation?
THE WITNESS: I was less than a year old.

BY MR. CARROLL:

Q Was there anything that prompted you to go to Dr. Simons?
MR. WARBURGH: Your Honor, I object to this, too.
THE COURT: I will see where he's going, subject to connection, anyway.
Q Was there anything that prompted you to go to Dr. Simons?
A I was having pains in my knees.
THE COURT: In your knees?
THE WITNESS: Yes.
Q Did Dr. Simons give you any advice after examining you?
A He said that—
MR. WARBURGH: I object to this.
THE COURT: Yes, what Dr. Simons said.
MR. CARROLL: All right, I have no further questions.

RECROSS-EXAMINATION

BY MR. WARBURGH:

[118] Q With respect to Dr. Simons, did you ever ask Dr. Simons to send a report to the local board concerning your hip condition?
A I asked my mother to take care of that for me.
MR. WARBURGH: No further questions.
THE COURT: I had read earlier a roentgenologist or an X-ray doctor's report to the effect that there is

nothing wrong with the knees, if you remember, attached to the medical record.

MR. WARBURGH: It's in evidence.

THE COURT: All right, you may step down, Mr. Jenkins.

(Witness excused.)

THE COURT: Call your next witness, Mr. Carroll.

MR. CARROLL: Mr. Bibuld.

[119] JEROME BIBULD, called as a witness on behalf of the defendant, after having been first duly sworn by the Clerk, testified as follows:

THE CLERK: State your name for the Court Reporter.

THE WITNESS: Jerome Bibuld, 607 East 12th St., New York 10009.

MR. WARBURGH: Your Honor, the Government at this time would ask for an offer of proof as to what this witness is going to testify to.

THE COURT: Yes, Mr. Carroll, would you please indicate to the Court.

MR. CARROLL: Yes. Mr. Bibuld will testify to the fact that he spoke to Mr. Jenkins after Mr. Jenkins had received his induction order on February 8th, 1971, and at that time we discussed Mr. Jenkins' case with him. The problem in Mr. Jenkins' case, as Mr. Bibuld saw it, was the fact that Mr. Jenkins had not received a 1-A classification card.

After discussing Mr. Jenkins' case with him for some time, Mr. Bibuld elicited from the registrant the fact that he was conscientiously opposed to all wars and it was only at this time [120] that Mr. Jenkins became aware of his conscientious opposition to all wars.

MR. WARBURGH: The Government would object to this testimony based on the fact that the only issue before the Court is whether there was any error in the local board's processing of this defendant since 1966.

THE COURT: Determinations had been made by the Board and the record which was elicited this morning

indicates that there were determinations made by the Board and there had been no moves afoot by anyone to overturn those determinations by the Board.

This gentleman was someone in the neighborhood who gratuitously gives advice to people who go to see him. It has no effect on the Board. It's advice that he would give and I just don't see the relevancy to the issue involved in this case.

MR. CARROLL: Yes, I understand.

THE COURT: If you can give me some—

MR. CARROLL: The relevancy here, your Honor, is the fact that the Board did not consider the registrant's CO claim, and I think the reason for that, your Honor, if I might, is that on [121] February 23rd the registrant stated, in a document that he signed, that he had moral opposition to the present war.

Now, I think the sincerity of the registrant's beliefs in opposition to all wars was in question because on March 8, 1971, when the registrant stated that in fact his opposition was to all wars, the local board took no action on this and the State Selective Service Director—New York City Headquarters' Director, rather, did not take any action on this.

So what I am trying to show is this is not a fabrication of the record after.

THE COURT: All the facts that you have stated so far the record indicates so far. So what can Mr. Bibuld testify to contrary to what you have already said or even to add to it? Do you want redundancy at the very best? In other words, whatever you have said up to now has been elicited by the letters and other papers which were part of Government's Exhibit 1.

MR. CARROLL: Well, I think the sincerity of the registrant is in issue.

THE COURT: He's not going to be able to [122] question those papers. No one questions those papers and there was a decision by the Board.

Now, he doesn't like it, you don't like it, maybe Mr. Jenkins doesn't like it. That's not relevant to the issue before me.

MR. CARROLL: But the decision of the Board is in question, and I think it goes back to the Board's—

THE COURT: No, that's exactly what I am driving at. I don't think the decision of the Board is in question here. If it is, it would be another story. It's not.

MR. CARROLL: I think that's in issue in the case.

THE COURT: In what way?

MR. CARROLL: It goes back to my motion for judgment of acquittal, that the Board was acting beyond the law at the time when they refused to postpone the registrant's induction.

THE COURT: You can argue that point now, if you want to argue that point now. That would be very apropos now in view of this offer of proof. If you feel this offer of proof will shed light on your argument that you make on your [123] motion for acquittal, do so now. I want to give you every opportunity.

MR. CARROLL: I think the case in the Second Circuit at that time stated that if an individual requested a CO form, that it was a duty and obligation of the local board to postpone the registrant's induction and to schedule a permissive interview to determine the sincerity of the registrant's belief and the only thing that was to be an issue—

THE COURT: You base that argument on Geary?

MR. CARROLL: Geary, Stafford and the other cases which follow, Pacel v. Laird, for example, at this time the local board violated what was standard law in the Second Circuit.

THE COURT: They made a determination?

MR. CARROLL: What I am saying is they made a determination which was in violation of the existing law.

THE COURT: But there was a determination made.

MR. CARROLL: Yes.

THE COURT: You say, now, that determination [124] was a violation of the principle laid down in Geary?

MR. CARROLL: That's correct.

THE COURT: What's happened to Geary since?

MR. CARROLL: Well, I think this is one of the issues in this case.

THE COURT: That's the crux of this point now.

MR. CARROLL: Yes.

THE COURT: Therefore, what can Mr. Bibuld add to that argument?

MR. CARROLL: Well, Mr. Bibuld—

THE COURT: It now becomes strictly a question of law as to whether Geary is still in effect. If Geary is still in effect, you don't need his testimony.

MR. CARROLL: I am not saying Geary is still in effect. I am saying it was in effect at the time that all of the transactions that the registrant had the local board took place.

THE COURT: Assuming arguendo that that is so, now tell me—let's make it a question of law because that's all it is right now.

MR. CARROLL: I don't think you can separate [125] it from the facts in the case, though.

THE COURT: How is he going to change the facts in the case with his testimony?

MR. CARROLL: He's going to amplify on the sincerity of the registrant's beliefs, which I state was tested by the local board prior to any type of permissive hearing by the local board.

THE COURT: How do you argue against that, Mr. Warburgh?

MR. WARBURGH: After Geary, of course, we have the famous case of Ellert.

THE COURT: I am not going to that yet.

Mr. Carroll poses an argument now, if you wish to repeat it.

MR. WARBURGH: If I understand Mr. Carroll correctly, this witness would testify as to the sincerity of the defendant's beliefs, which is not in issue before the Court here.

THE COURT: Which is not in issue. It would have been an issue before the local board if the local board had determined to hear the issue, correct.

MR. WARBURGH: Right, and made a decision based on the merits.

[126] THE COURT: That's why I asked Mr. Carroll initially. They had already made a determination and

they decided not to review that determination. Now anything Mr. Bibuld would add—and I am not questioning anything he would say—would only support your argument, if you want to use it that way, that the Board should have re-opened at that time.

MR. CARROLL: Yes.

THE COURT: He hadn't discussed anything with the Board at that time, had he, this gentleman?

MR. CARROLL: Yes, he did, as a matter of fact.

THE COURT: That's the point.

MR. WARBURGH: In any event, the local board declined to consider the CO claim at that point.

THE COURT: On the ground that they had determined it.

MR. WARBURGH: Well, they had not determined it. They just declined to consider it based on the direction of the New York City Headquarters.

[127] THE COURT: Because his draft notice had been issued and he was told to report by a certain day.

MR. WARBURGH: That's correct.

THE COURT: And that this application for 150 form was received after the notice of classification was sent out. Is that the basis of your argument?

MR. WARBURGH: This 150 request was made after the pre-induction order was sent out.

THE COURT: That's what I said. I said classification. I meant pre-induction order.

That's the whole case here anyway.

MR. CARROLL: I know that.

THE COURT: What do we need this testimony for? That's the argument now. Did they have the right to close off then and not consider it? That to me is a question of law here, not further proof.

MR. CARROLL: I object to that. I except to that.

THE COURT: I will deny the offer of proof, if that offer of proof is directed in that area of adding testimony which would have, say, built [128] up his claim which had been by the Board denied to be reviewed.

All right, that's out. Denied.

MR. CARROLL: Are you asking him to step down?

THE COURT: If that's what you want to bring out through this witness, I am denying your right. In other words, you made an offer of proof. I am denying you that offer of proof.

Is there anything else he can talk about?

MR. CARROLL: Well, that's all.

THE COURT: You may step down.

(Witness excused.)

MR. CARROLL: Mrs. Bates is the mother of the registrant-defendant in this case and she will testify to the fact that in response to the, I think it was, telephone call that the registrant made to her in response to the form 56 requesting additional information, that she wrote the letter and that she had expected a response from the local board to the letter that she had written.

[129] MR. WARBURGH: That's not in issue here, either.

THE COURT: If that's what she wants to testify to, that testimony has come up, if you want to repeat it, it's okay with me, repeat it through her. I will ask her as I asked the lady, Miss Morris—I asked her if there was anything in that letter which asked for a reply, and Miss Morris said no. I would have to ask her the same way.

If you want to put her on, you may.

MR. CARROLL: Yes. That's all I am going to ask her.

MR. WARBURGH: Just for a limited purpose.

THE COURT: To the effect that she wrote this letter in response to a request by, I am sure, Mr. Jenkins called his mother and told her to write it. I will let her testify to that. We have had testimony with regard to it, so there is no reason why he can't bring it out in his defense.

MR. WARBURGH: Will she testify to anything else?

MR. CARROLL: No.

[130] THE COURT: We will find out. I don't think you need to divulge everything she has to say.

Do you want Mr. Bibuld to remain?

MR. CARROLL: No, unless the U.S. Attorney wants him to remain.

THE COURT: You are excused. You may stay here. The courtroom is public. I am just excusing you from further participation.

PHYLLIS BATES, called as a witness on behalf of the defendant, after having been first duly sworn by the Clerk, testified as follows:

THE CLERK: Will you state your name and address, please.

THE WITNESS: Phyllis Bates, 107 Van Brunt Street, Brooklyn.

DIRECT EXAMINATION

BY MR. CARROLL:

Q Mrs. Bates, I am going to refer your attention to a letter written on October 4th of 1966 received by the local board on October 5, 1966, which is a copy of one of the exhibits in Government's Exhibit 1, and I would ask you to just read this letter, if you don't remember the contents.

[131] Have you read the letter?

A Yes.

Q Was that letter written by you?

A Yes.

Q Was that letter written by you in response to any communication that you had with your son, Ronald Jenkins?

A Yes.

Q Could you for the benefit of the Court tell the reason that you wrote that letter?

A Well, he was away at school and he needed a medical for Selective Service which he couldn't get because he was in Greensboro. So I wrote to Selective Service and I also sent them his medical card and his doctor's name so they could get in touch with the medical center and his doctor also, and I also specified in the letter that if this wasn't sufficient, to let me know.

Q Did you receive any response from the local board?

A No. They only sent the clinic card back and that was all.

MR. CARROLL: No further questions.

THE COURT: They sent the clinic card back?

THE WITNESS: Right.

[132] CROSS-EXAMINATION

BY MR. WARBURGH:

Q Referring to the letter, the last sentence on the first page: "I will also write to the medical center," is that what it says there?

A Right.

Q And the last part of the letter says, "Any other information that you need that will have to be gotten from Brooklyn or Manhattan," right?

A Right.

MR. WARBURGH: I have no other questions.

MR. CARROLL: I have no further questions.

THE COURT: May I ask Mrs. Bates how old was Ronald when he injured his hip? Did he injure his hip or was it some other—

THE WITNESS: The doctor didn't even know. They said when he was a baby he must have fell on a sharp instrument and he had an emergency operation 7:00 o'clock at night. He pretty near—

THE COURT: When was that?

THE WITNESS: 1949.

THE COURT: In other words, the doctor thought he might have fallen on something sharp?

THE WITNESS: Right.

[133] THE COURT: How long was he in the hospital?

THE WITNESS: Ten weeks.

THE COURT: After that?

THE WITNESS: He had to wear a brace.

THE COURT: Where was that? What hospital?

THE WITNESS: It was a hospital on 59th St.

THE COURT: Is that the Presbyterian Hospital?

THE WITNESS: They moved from that hospital to Medical Center, but he was operated on 59th St. I forget the name of the hospital. He had to wear a brace.

THE COURT: That was in 1949?

THE WITNESS: Yes.

THE COURT: All right.

MR. CARROLL: No further questions.

MR. WARBURGH: Nothing, your Honor.

THE COURT: You may step down, Mrs. Bates. Thank you.

(Witness excused.)

THE COURT: You may call your next witness, Mr. Carroll.

MR. CARROLL: That's all. Defense rests.

THE COURT: Government?

[134] MR. WARBURGH: Your Honor, the Government has nothing further, no rebuttal.

THE COURT: Government rests, both sides rest.

All right, up front and center.

Would you, Mr. Carroll, prefer to argue orally now or would you prefer to submit memoranda with your own proposed findings based upon the record that has been had here? I will give you the opportunity, if you wish.

MR. CARROLL: Can I think about that for a couple of seconds, at least?

I hadn't considered that.

THE COURT: I will let you argue now and have both sides argue now on the motions and I think I might be able to make a decision immediately. But if you wish, I will give you an opportunity to submit your proposed findings based upon the record as you know it, and give Mr. Warburgh the same opportunity with your memorandums. I think the issue here is not that insurmountable. I think there are a number of cases that seem to pave the way that are almost inescapable. But you choose your avenue.

[135] MR. CARROLL: How much time would I have to submit proposed findings of fact?

THE COURT: How much time would you need?

MR. CARROLL: A week.

MR. WARBURGH: It doesn't make any difference.

THE COURT: Any objection to giving him this time?

MR. WARBURGH: I have no objection.

THE COURT: All right. Both sides rest.

The Court will reserve decision. The defendant is granted one week.

MR. CARROLL: I would just like to make one thing clear. Will that be one week in which to mail out—

THE COURT: When I say a week, if it comes to me two days later or a day later, I won't hold you to that. Today is October 3. October 10.

Now, the 9th is a holiday. So let's make it October 11th. In other words, defendant to file with Court by 10/11. Instead of sending it to the Brooklyn Clerk's Office where it would be filed ordinarily and then sent on to me, send it directly to me. You have the address here, 900 Ellison Avenue. Send it to me directly. That [136] way we will circumvent the Clerk's Office there and save a little bit of time. So mail it to me by the 10th and I will get it on the 11th.

Mr. Warburgh, I am not going to give you much time to answer it.

MR. WARBURGH: By Friday of that week.

THE COURT: All right, Government to answer and you are here now so you can walk next door and file it with me by 10/13. That's your proposed findings, and I would like you to please stick to the record as it is. You have a photocopy of all the Government Exhibit 1 papers that were used. So refer specifically to any paper or date in your memorandum, if you wish, and I would like you particularly to answer the questions that I would put to you that are posed by the opinion that I showed you this morning that was decided by our Circuit Court very recently, decided December 27, 1972, slip opinion which I received this morning in the case of Frank Martire, Jr., against Selective Service Board 15, and the Capobianco case which you know about, the Johnson case which I assume you know about, and, of course, I got Nordlof, Geary and Ellert. Those are the [137] cases which I think are the ones which would raise the issues that I believe are before us here.

MR. WARBURGH: Could you give me the date of that opinion by the Second Circuit Court of Appeals?

THE COURT: Decided December 27, '72. Their number is 932—the September term of 1971. Take a peak at it and get whatever numbers you want. This is what you may want. Docket No. 35630. If you wish, Mr. Carroll, before you leave, my clerk will make a photocopy of this. It's only a two-page decision.

MR. WARBURGH: Can the Government keep possession of Government Exhibit 1, which is the Selective Service file, for the purposes of drafting our proposed findings of fact?

THE COURT: Sure.

(At 4:45 o'clock p.m. the trial was concluded.)

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EXHIBITS

Government's Exhibit No.	Description	For Id.	In Ev.
1	Selectric Service File		12
2	Card	19	78

SUPREME COURT OF THE UNITED STATES

No. 73-1513

UNITED STATES, PETITIONER

v.

RONALD S. JENKINS

ORDER ALLOWING CERTIORARI—Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is set for oral argument in tandem with No. 73-1395.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1513

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SUPREME COURT, U.S.

UNITED STATES OF AMERICA,

v.

RONALD JENKINS

APPLICATION FOR LEAVE TO PROCEED AS A PAUPER AND TO DISPENSE WITH THE NECESSITY OF FILING PRINTED BRIEFS IN OPPOSITION TO PETITION

Your Respondent, RONALD JENKINS, by his counsel, JAMES S. CARROLL, Esq., moves for leave to file his opposition papers to the Government's Petition for Certiorari as a pauper and to dispense with the necessity of filing printed briefs in opposition to the Government's Petition for Certiorari and respectfully shows the Court as follows:

1. That Respondent is without means of any kind and is desirous of opposing the Government's Petition for Writ of Certiorari and is unable to pay the fees and costs;

2. That Respondent was allowed to proceed in forma pauperis in the Court below and counsel was assigned to represent him by the Court below.

WHEREFORE, your Respondent requests that he be granted leave to proceed as a pauper.

JAMES S. CARROLL
Attorney for Respondent

MAY 9 1974
MICHAEL RODAK, JR. CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1513

UNITED STATES OF AMERICA

v.

RONALD JENKINS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM IN OPPOSITION TO
THE GRANTING OF THE PETITION FOR
WRIT OF CERTIORARI

Petitioner, United States of America, seeks review of the dismissal of its appeal pursuant to Title 18 U.S.C. Section 3731 entered on December 11, 1973, petition for rehearing denied on February 6, 1974. The Court of Appeals for the Second Circuit concluded after an extensive and scholarly opinion that under Title 18 U.S.C. Section 3731 and under the Double Jeopardy clause of the Fifth Amendment of the United States Constitution that it was without jurisdiction to entertain the Government's appeal.

The Government takes issue with the Court of Appeals' statement that were it to hold otherwise and hold that it had jurisdiction to hear the appeal, it would have to overrule a long line of cases including Kepner v. United States, 195 U.S. 100 (1905); United States v. Sisson, 399 U.S. 267

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

UNITED STATES OF AMERICA

v.

RONALD JENKINS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM IN OPPOSITION TO
THE GRANTING OF THE PETITION FOR
WRIT OF CERTIORARI

JAMES S. CARROLL, Esq.
Attorney for Respondent
126 West 119th Street
New York, New York 10027
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(1970); Fong Foo v. United States, 369 U.S. 141 (1962). The Government contends that the Court of Appeals' belief that it would have to wade throught a Kepner, Fong Foo and Sisson thicket to find jurisdiction is incorrect and that in any event the thicket is not so dense. The Government further states in disagreement with the Court of Appeals that this Court should accept jurisdiction to clarify certain problems associated with the interpretation of Section 3731 and the Double Jeopardy clause and it implies that the issues involved in this criminal case were merely legal and not of a factual nature and that Double eopardy is not involved since the Court could simply direct that the District Court enter a finding of guilty on the merits.

The Government makes much of the fact that Mr. Jenkins' case could have been determined on the basis of the Selective Service file without requiring a trial on the merits. Furthermore, the dissenting opinion below also states that of the nine Findings of Fact of the District Court, none of these findings were disputed and could have just as easily been determined by a pre-trial motion to dismiss. Yet, your respondent contends that contained in the Conclusions of law of the District Court was the unmistakable implication that Mr. Jenkins, who took the stand in his own behalf, was sincere in his reliance on prior law of the Second Circuit when he made his post-induction order claim for conscientious objector status. In fact, the Court of Appeals recognized such good faith reliance as a possible defense. See Government's Petition at page 28a. In any event, it is rather cavalier of the Government to suggest that the attendant uncertainty of being required to go through the guantlet twice can somehow be mitigated by setting up an artificial distinction between a strictly legal determination (Fong Foo, supra; United States v. Hill, 473 F2d 759 (9th Cir. 1972))and a factual determination or by giving the Respondent the benefit of a directed conviction.

The law on this issue is clear although the law on other aspects of the Double Jeopardy clause may be subject to some dispute (compare United States v. Ponto, 454 F.2d 657 (7th Cir. 1971); United States v. Findley, 439 F. 2d 970 (1st Cir. 1971) with United States v. Serfass, Third Circuit, No. 73-1736). It is quite clear that jeopardy attached in Mr. Jenkins' case when the first witness was sworn and that an appeal from dismissal is a violation of the Double Jeopardy Clause of the Constitution.

Respectfully Submitted,

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No. 73-1513

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD S. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–41a) is reported at 490 F. 2d 868. The opinion of the district court, in the form of "Findings of Fact and Conclusions of Law" (Pet. App. B, pp. 42a–52a), is reported at 349 F. Supp. 1068.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1973 (Pet. App. C, pp. 53a–54a). A timely petition for rehearing was denied on February 6, 1974 (Pet. App. D, pp. 55a–56a). By order of February 28, 1974, Mr. Justice Marshall ex-

tended the time for filing a petition for a writ of certiorari to and including April 7, 1974 (a Sunday). The petition was filed on April 8, 1974, and was granted on May 28, 1974, along with the petition *United States* v. *Wilson*, No. 73-1395, and the cases were set down for argument in tandem. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the United States from appealing an order of the district court dismissing an indictment, after a trial without a jury, where the district court found that the defendant committed the acts charged in the indictment but concluded as a matter of law that the defendant had established an affirmative defense, and where the error of the district court can be corrected without a retrial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 3731, as amended by Title III of the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1890, provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. In an indictment returned in the United States District Court for the Eastern District of New York, respondent, a registrant under the Universal Military Training and Service Act, was charged with having "knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to submit to induction into the armed forces of the United States, after notice had been given to the defendant by Local Board No. 50, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 24th day of February, 1971," in violation of 50 U.S.C. App. 462(a) (App. 3).

Although the essential facts of the case were undisputed, respondent made no motion to dismiss the indictment prior to trial. Instead, on July 8, 1972, indicating his intention to proceed to trial, respondent filed a number of papers including a motion concerning the *voir dire* of prospective jurors, requests to charge the jury, a trial memorandum of law, and a motion for a judgment of acquittal (App. 1, 4). Subsequently, on October 3, respondent waived a jury trial, and the case was tried and concluded before the district court on that day. Three weeks later, on Octo-

ber 24, the district court filed a document entitled "Findings of Fact and Conclusions of Law" (Pet. App. B, pp. 42a–52a). The court found that, as charged in the indictment, "the Local Board mailed to defendant * * * an Order to Report for Induction on February 24, 1971," which was received by him, that only thereafter did the defendant make a conscientious objector claim, and that "[t]he defendant did not report for induction on February 24, 1971" (*id.* at 43a–44a).[1] The district court then proceeded to discuss respondent's defense to the indictment, "that at the time of his alleged commission of the crime,

[1] The "Findings of Fact" were as follows:

"1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

"2. Defendant registered with Local Board No. 50, Brooklyn, New York, on September 23, 1966.

"3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

"4. On January 20, 1971, the defendant was given a pre-induction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

"5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

"6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board and requested SSS Form 150 for a conscientious objector classification.

"7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his request for a postponement of his induction had been denied.

"8. The defendant did not report for induction on February 24, 1971.

"9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971."

viz., his refusal to submit to induction, the law of the Second Circuit [since overruled by *Ehlert* v. *United States*, 402 U.S. 99] was such that he was entitled to a postponement of his induction to enable the Board to pass on his claim for C.O. status" (Pet. App. B, p. 44a), a claim which he had concededly asserted for the first time after receiving his notice to report for induction (*id.* at 43a). Finding the law of the Circuit at the time to be as stated, the court concluded that "the defendant JENKINS would be [prejudiced] by a retroactive application of Ehlert" (*id.* at 50a).[2] Accordingly, the district court concluded that it "cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law" (*id.* at 52a). Under the heading "Conclusions of Law," the district court stated that "[t]he indictment in this case is dismissed and the defendant is discharged" (*ibid.*).

[2] The district court made no express finding that Jenkins had in fact relied on "the applicable law of the Second Circuit." The reason for the absence of such finding is that neither the respondent nor the draft counselor with whom he consulted, and who was called to testify as to respondent's sincerity (App. 70), testified that they had relied on "the applicable law of the Second Circuit." Respondent's claim boiled down to the argument that the local board was bound to follow "the applicable law of the Second Circuit" (even though that "law" was subsequently held to be erroneous) and that the lawfulness of the local board's action must be viewed in light of the Second Circuit's understanding of the law at the time.

2. Since the order of the district court here conflicted with the holding of the district court in *United States* v. *Mercado*, 359 F. Supp. 604 (S.D.N.Y.), which was then pending on appeal from a judgment of conviction, the Solicitor General authorized an appeal to the court of appeals pursuant to the Criminal Appeals Act, 18 U.S.C. 3731.[5] The court of appeals stated that Congress intended to authorize an appeal from an order of the district court terminating a criminal prosecution in all cases in which an appeal would not violate the Double Jeopardy Clause (Pet. App. A, p. 5a):

> Appellant asserts, and appellee does not dispute, that Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set at rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91-1296, at 4-13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal.

But the majority (over the dissent of Judge Lumbard) held that an appeal was barred in this case by the Double Jeopardy Clause. The court reasoned that, "for double jeopardy purposes," the district court judge had acquitted the respondent (*id.* at 25a-26a):

> His ruling was based on facts developed at trial, which were not apparent on the face of

[5] Indeed, in *Mercado*, 478 F. 2d 1108, the Second Circuit seemingly vindicated our position on the merits in the present case (see *infra*, pp. 14-15).

> the indictment, and which went to the general issue of the case. The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in *Ehlert* should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in *Ehlert*, and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact.

Although a reversal of the order of the district court would not have necessitated a retrial, but only a direction to the district court to enter a judgment in accordance with its findings, the court in effect held that the appeal itself placed respondent in jeopardy a second time. In reaching this conclusion, the majority relied principally on what it characterized (Pet. App. A, p. 16a) as the "dictum" in *United States* v. *Ball*, 163 U.S. 662, 671, that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." While the court of appeals found that this dictum had been followed in subsequent cases (*Kepner* v. *United States*, 195 U.S. 100; *Fong Foo* v. *United States*, 369 U.S. 141; and *United States* v. *Sisson*, 399 U.S. 267), it suggested that a "[r]e-examination of the dictum in Ball * * * may well be

desirable, particularly now that the Double Jeopardy clause has been extended to the states." It concluded, however, that "this is far beyond our power as an inferior court" (Pet. App. A, pp. 29a–30a, n. 20).

Judge Lumbard, who dissented from the holding of the majority, concluded that "the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case" (Pet. App. A, pp. 40a–41a):

> An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice. Only last term, the Supreme Court in *Illinois* v. *Somerville,* 410 U.S. 458 (1973), rejected the notion that technical errors resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again". 410 U.S. at 470.
>
> I believe that the "ends of public justice" will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law. That Jenkins is guilty would appear to be indisputable in light of our decision in *United States* v. *Mercado,* 478 F. 2d 1108 (1973), in which we held without reservation that even prior to *United States* v. *Ehlert,* the law of this circuit was that an individual had to report for induction although his post-induction notice claim for conscientious objector status was still pending.
>
> Accordingly, I would vacate the order of the court below and remand for a proper application of the law. [Footnote omitted.]

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case presents a narrow but important issue with respect to the government's right of appeal in criminal cases. Because of the recent amendment to the Criminal Appeals Act (18 U.S.C. 3731, as amended by 84 Stat. 1890), the answer is controlled directly by the Double Jeopardy Clause of the Fifth Amendment[4] and involves none of the familiar debates about the correct definition of a motion in arrest of judgment or a motion in bar. See, *e.g., United States* v. *Sisson,* 399 U.S. 267. Partly because of the prior statutory history, the constitutional question tendered here has never been directly resolved by this Court. Certainly, it is not foreclosed by *Sisson,* a

[4] So much is common ground. Nor is a contrary position tenable: the Criminal Appeals Act, 18 U.S.C. 3731, now allows the government to appeal from any "decision, judgment, or order of a district court dismissing an indictment or information," whatever the ground, except only "where the double jeopardy clause of the United States Constitution prohibits further prosecution." Whatever its correct characterization, the district court's action in this case, which dismissed the indictment, is within the Statute. See our brief in *Serfass* v. *United States,* No. 73-1424, at pp. 12–19.

decision controlled by statutory restrictions, now removed, and otherwise distinguishable.

On the other hand, the case invokes no novel doctrine. We eschew the temptation of a full reexamination of the double jeopardy principle, because the limited compass of the issue presented does not require it. In the present setting, there is no occasion to define the boundaries of the principle that a factual determination on the merits which acquits the defendant—whether made by a jury or a judge—insulates him from further proceedings. The only submission we make here is that a purely legal error that can be isolated from any fact finding is correctable by appeal without implicating the Double Jeopardy Clause—at least if correction does not require retrial of any fact already found.[5]

The question does not, of course, arise in the usual case that reaches a conclusion. In a trial to a jury, after the return of a general verdict, the problem presented here occurs only if the jury convicts and the judge thereafter enters a contrary judgment. So, also, in a case tried to the court alone, an unexplicated acquittal does not raise the issue that concerns us here. The rule we postulate reaches only those situations in which the factual determination and the legal conclusion are clearly separated, and correction of the error of law leaves the findings of fact undisturbed.

[5] In stating the question so narrowly, we should not be understood to foreclose a broader argument. Specifically, we do *not* concede that the Double Jeopardy Clause bars every government appeal which, if successful, would require a retrial. See footnote 16, *infra*. But, because whether a new trial must follow an appeal is always a relevant consideration, we focus on that circumstance in this case.

But, when those conditions are met, we submit the Double Jeopardy Clause does not bar the government's appeal, regardless of *when* the error of law occurred (whether before, during or after trial), and regardless of the *label* attached (a dismissal of the indictment, a directed verdict, a judgment of acquittal, or the sustaining of a motion in arrest). If we are right, it follows that the district court ruling here is appealable, notwithstanding that it was based on facts "developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case" (see Pet. App. A, p. 26a)—provided only that the appeal does not disturb any of the underlying facts found.

Accordingly, before defending our thesis, it is essential to establish that the district court's action sought to be appealed was, indeed, a pure decision of law, and was one that can be corrected without retrial. If we seem to belabor the point, it is only because the majority opinion below appears to cast doubt on both those premises by characterizing the dismissal as a "holding that the [Selective Service] statute should not be applied to [the defendant] *as a matter of fact*" (Pet. App. A, p. 26a, emphasis added),[6] and by suggesting that a new trial might be necessary if the government's appeal succeeded (Pet. App. A, p. 28a).

1. Admittedly, the district judge made a factual determination. As it happens, the only facts that mat-

[6] Elsewhere in its opinion, the court of appeals apparently acknowledges that we challenged only a ruling of law. See Pet. App. A, pp. 28a–29a, 31a.

ter were undisputed and might have been stipulated before trial or recited in the indictment. In the event, they were disclosed in the trial. What controls, however, is that these critical facts were expressly articulated in findings entered by the district court—quite distinct from the ruling of law—and were not sought to be challenged on appeal. Of course, these facts were the predicate for the court's order. But they remain wholly separate and can be left undisturbed while the legal issue is tested. The case is precisely the same as if the findings of fact had been entered by a special jury verdict—or by the judge at an earlier date—and the court subsequently ruled, as a matter of law, that they foreclosed conviction.

The separateness of the factual findings is entirely clear in this case. This is not one of those situations in which the result turned on credibility or demeanor or assessing a mental attitude (*e.g.*, "willfullness" or "sincerity"). Compare *United States* v. *Sisson, supra,* 399 U.S. at 277–278, 286–287, 288, 289. Here, the facts relevant to the legal ruling were wholly objective and impersonal. The character and beliefs of the defendant were irrelevant. Indeed, the result is governed solely by the timing of undisputed events.

Shortly stated, the facts were these: respondent was found to have failed to report for induction after having been classified I–A, after having received his notice to report, and after having been told that his induction would not be postponed on account of a belated conscientious objector claim made for the first time subsequent to receipt of the induction notice

(Pet. App. B, pp. 43a–44a). The only legal question posed and resolved by the district judge (erroneously, we say) was whether, given the sequence of these actions, respondent violated 50 U.S.C. App. 462(a). The district court ruled in the negative. That ruling, we submit, was plainly one of law, no less than this Court's contrary holdings in *Ehlert, supra,* and *Musser* v. *United States,* 414 U.S. 31.

2. Because the decision from which the appeal was taken is a pure legal ruling, we could perhaps argue, as Judge Lumbard concluded below (Pet. App. A, pp. 32a–39a), that it is more properly described as a "dismissal," effectively arresting judgment, than an "acquittal." We acquiesce in the characterization given by the majority below only because *Sisson* teaches us that a final disposition on the merits that looks beyond the face of the record and is bottomed on facts adduced at trial, is an "acquittal." But, of course, so categorizing the decision does not end the inquiry, any more than does the trial judge's choice of rubric. See *United States* v. *Jorn,* 400 U.S. 470, 478, n. 7; *United States* v. *Sisson, supra,* 399 U.S. at 279, n. 7.

At all events, we must not be misunderstood to accept that this "acquittal" is of a kind with a general jury verdict of "not guilty" or the equivalent of an unexplicated conclusion of a judge sitting alone as trier of fact.[7] On the contrary, the ruling appealed here is of the same character as an order arresting

[7] This will not ordinarily occur in a non-jury trial, since Rule 23(c) of the Federal Rules of Criminal Procedure requires the judge "on request [to] find the facts specially."

judgment for failure of the indictment to state an offense, or a judgment ordered on special jury findings, or, indeed, the decision of an appellate court. That here the judge both found the facts and drew the legal conclusion, and incorporated both in the same document, is irrelevant—so long as we can clearly distinguish the exercise of each function, leaving the first untouched and challenging the other. As we have shown, there is in this case no arguable difficulty in severing the legal error.

3. We turn now to the question whether a successful appeal by the government would require a retrial. We think not. Indeed, it seems to us plain that the findings of fact already entered by the district court will compel the entry of a judgment of conviction, without any further proceedings, if the legal ruling is reversed on appeal (as we say it must be under *Ehlert* and *Musser*). In our view, the findings already made—resolving every possible issue on the merits—leave no room for any other course.

To be sure, the court of appeals, adverting to its earlier opinion in *United States* v. *Mercado*, 478 F. 2d 1108, 1111 (C.A. 2), suggests that respondent might still have available to him the defense that, in failing to report for induction, he "in fact reasonably relied in good faith on the [pre-*Ehlert*] case law or upon the knowledge that local boards in [the Second Circuit] * * * would consider a belated conscientious objection claim" (*ibid.*). But, even accepting the validity of

such a defense in a proper case,[8] it is foreclosed to respondent. First, just as in *Mercado* itself (where the conviction was affirmed), "[t]here has been no showing that he in fact was aware of or relied upon the case law * * *" (*ibid.*). Respondent never suggested such an excuse, although both he and his "counselor" testified at the trial (see n. 2, *supra*, p. 5). Moreover, whatever respondent knew of Second Circuit law when he belatedly advanced his conscientious objector claim, he well knew, before he committed the offense of failing to report for induction, that the board had refused to delay or excuse his reporting as scheduled. As the district court expressly found, "he was told to report for induction on the next day because his request for a postponement of his induction had been denied" (Pet. App. B, p. 44a). Nor has respondent ever disputed this fact. Thus, at the relevant time, he cannot have been under any misapprehension.

At all events, however, respondent has estopped himself by advancing no such claim at trial. This was not a case prematurely ended before the defendant had opportunity to make his full defense. He put in all the

[8] Both in this case and in *Mercado*, the court of appeals merely suggests, very tentatively, the possibility of such a defense. Indeed, in *Mercado*, the court first rejected the suggestion for that case and cited other decisions to the effect that the "erroneous belief that an induction order is invalid" normally constitutes no defense, and only then commented that "perhaps there is room for flexibility in enforcement of this rule to avoid injustice in a particular case" (478 F. 2d at 1111).

evidence and made all the arguments he deemed appropriate, and, on that basis, the trier of fact—here the judge—reached factual conclusions. Normally—absent newly discovered evidence—that would be the end of the matter. Overlooking an arguable defense based on facts always available is no ground for a new trial. It would not be where a decision arresting judgment is overturned on appeal. No more is it here. But even if respondent were ultimately to obtain a new trial, that would be at his own instance, on grounds which he might equally have advanced if convicted—not a consequence of any ruling in the present appeal. Thus, under settled principles, the possibility that respondent could obtain a new trial by virtue of the *Mercado* dictum in no way implicates the Double Jeopardy Clause. See *United States* v. *Smith*, 331 U.S. 469, 474; *United States* v. *Ball, supra*, 163 U.S. at 672.

It follows, we submit, that the government's appeal, if successful, will require no retrial, nor even any reopening of the case to allow additional evidence. If the district court's legal conclusion was erroneous, there is no escaping the entry of a judgment of conviction on the findings of fact already made.

4. The premises established, we return to our submission that the Double Jeopardy Clause does not bar the government's appeal of a legal ruling that leaves all factual determinations undisturbed and provokes no second trial. The balance of our brief is devoted to showing that the rule we suggest is consistent with the original understanding of the constitutional provision and with the decisions of this Court in analogous situ-

ations, and that the cases relied upon by the court below would mandate no different result.

We begin (*infra*, pp. 18–24) by briefly sketching the background against which the Double Jeopardy Clause was adopted, concluding that the English common law, at its most restrictive, did not bar correction of legal error when no second trial ensued. The sparse legislative history of the Fifth Amendment, we note, is not inconsistent. Nor is there anything to the contrary in the jurisprudence of this Court, which repeatedly stresses that the double jeopardy provision is concerned with a second trial or second punishment for the same offense.

Next (*infra*, pp. 25–36), we examine in detail those decisions of this Court that the majority below deemed dispositive: *Ball, Kepner, Fong Foo* and *Sisson*. We notice many distinctions, but focus on the critical difference that in each of them the ruling challenged, unlike here, was at least partly a factual determination on the merits, and that, in the first three cases, the government was effectively seeking a retrial.

Finally (*infra*, pp. 37–41), we analogize our case to two other situations which, the Court has consistently held, do not implicate the Double Jeopardy Clause. One is the recognized appeal by the government from a decision arresting judgment after conviction. We suggest it can make no difference, in terms of the values underlying the double jeopardy principle, whether that post-conviction ruling is based on the allegations of the indictment or on facts disclosed at trial. The other comparable situation is appellate review by this Court of a decision of a court of appeals reversing a

conviction on grounds such as the district judge invoked here. In that situation as well as in ours, the action setting aside the conviction is based on facts adduced at trial that bear on the merits and is, therefore, presumably an "acquittal." We perceive no reason why the Double Jeopardy Clause should be deemed to bar review in one case and not the other.

II. SINCE THE DOUBLE JEOPARDY CLAUSE WAS INTENDED TO LIMIT THE NUMBER OF TIMES A DEFENDANT COULD BE TRIED FOR THE SAME OFFENSE, IT DOES NOT BAR AN APPEAL HERE

1. The starting point for any inquiry into the purpose of the Double Jeopardy Clause must be the common law rule that served as the backdrop for the Framers of the Constitution (see *Kepner* v. *United States*, 195 U.S. 100, 125). The most succinct statement of that rule, and one "which greatly influenced the generation that adopted the Constitution,"[9] is found in 4 *Blackstone's Commentaries*, Ch. XXVI, p. 335 (Tucker ed.). There, in describing the common law plea of *autrefois acquit*, Blackstone observed:

> [T]he plea of the *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly found* not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar to *any subsequent accusation* for the same crime. [Emphasis added.]

[9] *Green* v. *United States*, 355 U.S. 184, 187.

The same theme is reflected in IV Hawkins, *Pleas of the Crown* 312 (1795 ed.):

> The plea of *auterfoits acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found "not guilty" on an indictment or appeal *free from error*, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of *any subsequent indictment* or appeal for the same crime. [Emphasis added.][10]

The thrust of these commentaries is that the common law double jeopardy principle barred a second trial on the same facts only if (a) the first acquittal was "fairly found" or "free from error," and (b) the subsequent proceedings involved a fresh indictment or accusation. This is, of course, analogous to the principle of *res judicata* that governs civil litigation. The rule was summed up by Mr. Justice Holmes, dissenting, in *Kepner* v. *United States*, *supra*, 195 U.S. at 134: "[E]verybody agrees that the [double jeopardy] principle in its origin was a rule forbidding a trial

[10] The "appeal" to which Hawkins made reference was not the process of appellate review of trial errors, but rather the quasi-criminal proceeding which could be commenced at common law by a private party. See Friedland, *Double Jeopardy* 8 (1969); Kirk, *"Jeopardy" During The Period Of The Year Books*, 82 U. Pa. L. Rev. 602, 605–606 (1934).

in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case."

That was, apparently, the English practice, at least until 1660: the Crown could have a new trial after an acquittal if the original trial entailed gross errors of law. 2 Hale, *Pleas of the Crown* 247 (Dougherty ed. 1800). To be sure, several cases decided in the late 17th century suggested that the Crown could not seek a new trial after a verdict of acquittal (Pet. App. A, pp. 9a–10a). However, it is not entirely clear that this rule had anything to do with policies reflected by the double jeopardy principle. Instead, it may have developed—in Judge Friendly's words—as "an independent principle" (Pet. App. A, p. 14a), reflecting the concern that, if a new trial were permitted after an acquittal, the prosecutor "would see where he failed before, and might use ill means to prove what he failed before." 21 Viner, *A General Abridgment Of Law and Equity* 478–479 (1793 ed.); see also Friedland, *Double Jeopardy* 285–286 (1969). At the same time, the law continued to permit retrial after a mistrial had been declared for whatever reason; it was only the verdict of the jury that was a bar to subsequent prosecution, and jeopardy was deemed to attach only to the verdict. Kirk, *"Jeopardy" During The Period Of The Year Books,* 82 U. Pa. L. Rev. 602, 603 (1934).

Thus, while the full contours of the English double jeopardy principle may not have been clearly marked at the time of the adoption of the Constitution, it is reasonably clear that, at most, it barred a second *trial*

for the same offense, and then probably only if the subsequent trial resulted from a fresh indictment. At all events, however, the common law principle affords respondent no shield in our case, since the present appeal would not place him in jeopardy of a second trial, either on the indictment upon which he was tried or upon a subsequent indictment."[11]

2. The legislative history of the Double Jeopardy Clause, which is fully explored in the majority opinion below (Pet. App. A, pp. 12a–14a), actually casts little light on the view of English common law principles that the Framers intended to adopt. The original version of the Double Jeopardy Clause, as introduced by James Madison in the House of Representatives, provided: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Congress 434. An unsuccessful effort was made in the House of Representatives to strike the word "trial" from the proposed amendment. *Id.* at 753. Representative Benson of New York objected to Madison's language because he thought it changed the existing law, which allowed a defendant to be tried a second time upon reversal of his original conviction. *Ibid.*[12] Although the original version of the Double Jeopardy Clause, as proposed

[11] Indeed, it appears that where a trial judge entered a judgment of acquittal upon special findings returned by a jury, an appeal was permitted at common law. Friedland, *supra*, at 287, n. 4. That is, in effect, the situation here.

[12] That an appeal could be taken by a defendant from a judgment of conviction, and that he could be retried if successful, was well established at common law. See Friedland, *supra*, at 240.

by Madison, was approved without change by the House of Representatives, the Senate rejected that language without recorded explanation in favor of the more traditional common law expression, employing the term "jeopardy" rather than specifying "more than one trial, or one punishment." See generally, Sigler, *Double Jeopardy* 30–31 (1969).

This somewhat sparse "legislative history," as the court of appeals acknowledged, "leave[s] it open to argue that the framers did not regard the crown's inability to appeal an acquittal after a trial on the merits as part of the common law concept of double jeopardy but rather as an independent principle, to be followed for a century [in England] but not incorporated in the clause * * *." (Pet. App. A, p. 14a).[13]

Although we shall address ourselves to the conclusion of the court of appeals that "any uncertainty as to the disposition of this case [based on the history of the Double Jeopardy Clause] is resolved, as far as we are concerned, by Supreme Court decisions * * *" (Pet. App. A, p. 14a), it suffices to reemphasize that the uncertainty that does exist regarding the intent of the Framers of the Double Jeopardy Clause involved only the question whether a *new trial* could be obtained on appeal after an *acquittal;* and that there is not the

[13] Although the court of appeals added that "the general flavor of the debate, especially the emphasis on the defendant's right to a retrial, is somewhat to the contrary" (Pet. App. A, p. 14a), we note that this somewhat inconclusive debate was in the House of Representatives, while the final version of the Double Jeopardy Clause was drafted in the Senate.

slightest support for the view that such an appeal was barred where, as here, no retrial is sought. Indeed, from *Ex parte Lange,* 18 Wall. 163, 169, to *Illinois* v. *Somerville,* 410 U.S. 458, every opinion of this Court which has spoken to the issue of the scope of the Double Jeopardy Clause has discussed it in terms of the protection against being twice *tried* or punished for the same offense.[14] And, in *Green* v. *United States,* 355 U.S. 184, the Court explained that because the Double Jeopardy Clause protects against a second trial, "the Government cannot secure *a new trial* by

[14] In *North Carolina* v. *Pearce,* 395 U.S. 711, the protection afforded by the Double Jeopardy Clause was summarized as follows (395 U.S. at 717):

> * * * [T]he Fifth Amendment guarantee against double jeopardy * * * has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

See also *Kepner* v. *United States, supra,* 195 U.S. at 130–131, 133, holding that the protection of the Double Jeopardy Clause is against "being again tried for the same offense," and construing *United States* v. *Ball,* 163 U.S. 662, as holding "that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment"; *Stroud* v. *United States,* 251 U.S. 15, 18, holding that "[t]he protection afforded by the [Double Jeopardy Clause] * * * is against a second trial for the same offense"; *Green* v. *United States,* 355 U.S. 184, 187–188, stating that the Double Jeopardy Clause was intended "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense"; *United States* v. *Jorn,* 400 U.S. 470, 479, holding that the Double Jeopardy Clause prohibits the state from subjecting individuals "to repeated prosecutions for the same offense."

means of an appeal even though an acquittal may appear to be erroneous" (355 U.S. 188; emphasis added).[15]

Accordingly, we submit that, looking to the purpose of the Double Jeopardy Clause, as revealed by its common law origins, the conclusion must be that the present appeal, which does not involve a retrial, is not barred.[16] Perhaps so, the majority argued below, but a different result is dictated by decisions of this Court. We now turn to examine that contention.

[15] *Green* did not involve an appeal by the United States.

[16] Even if a successful appeal would necessitate a retrial, we do not agree that the Double Jeopardy Clause would necessarily bar the appeal. The protection against being tried twice for the same offense is not absolute, and it has yielded under varying circumstances to "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689; *Illinois* v. *Somerville*, 410 U.S. 458; see also cases collected in Anno: *Double Jeopardy—Mistrial*, 6 L. Ed. 2d 1510–1519 (1962). Thus, in addition to the settled construction of the Double Jeopardy Clause permitting a defendant to be tried again and again when earlier trials have terminated prior to verdict (see *e.g.*, *United States* v. *Castellanos*, 478 F. 2d 749 (C.A. 2) and cases there cited), it is well settled that a defendant may be retried for the same offense where his conviction has been reversed on appeal. Here again, other considerations of policy have been held to outweigh the policies reflected by the Double Jeopardy Clause. *United States* v. *Jorn*, *supra*, 400 U.S. at 484; *United States* v. *Tateo*, 377 U.S. 463, 466. Finally, it appears settled that, when the court of appeals reverses a judgment of conviction because of the insufficiency of the evidence, it may in its discretion direct a new trial, even though its determination plainly is an "acquittal" within the generally accepted definition of that term. *Bryan* v. *United States*, 338 U.S. 552, 560; *United States* v. *Tateo*, *supra*, 377 U.S. at 467; see also *United States* v. *Howard*, 432 F. 2d 1188, 1191 (C.A. 9), which sets out the criteria for the exercise of such discretion.

Accordingly, most scholars and commentators have argued that an appeal from a verdict of acquittal, undertaken not to give the prosecutor a second try at proving what he failed to prove before, but to secure an opportunity to obtain a verdict free from substantial legal error, should not be barred by the Double Jeopardy Clause. See Friedland, *supra*, at 310; Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960); Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1927); Sigler, *supra*, at 114. Such appeals, as Mr. Justice Cardozo wrote for the Court in *Palko* v. *Connecticut*, 302 U.S. 319, 328, do not involve an attempt "to wear the accused out by a multitude of cases with accumulated trials."

Of course, as we have already stated, the important and unresolved questions surrounding this issue need not be reached here, since a second trial is not sought.

III. THE DECISIONS OF THIS COURT DO NOT CONSTRUE THE DOUBLE JEOPARDY CLAUSE AS BARRING AN APPEAL FROM AN ACQUITTAL WHERE A NEW TRIAL IS NOT SOUGHT

A. THE CASES RELIED UPON BY THE COURT OF APPEALS ARE NOT CONTROLLING HERE

Although acknowledging its own doubts whether the Double Jeopardy Clause was intended to bar an appeal from an acquittal, even where a new trial was sought, the majority below deemed itself bound by decisions of this Court to dismiss our appeal in this case. In reaching that conclusion, the court below relied upon the dictum in *United States* v. *Ball, supra,* 163 U.S. at 671, to the effect that a "verdict of acquittal * * * could not be reviewed * * * without putting [a defendant] * * * twice in jeopardy," and on what it characterized as the holding of three other cases (*Kepner* v. *United States,* 195 U.S. 100; *Fong Foo* v. *United States,* 369 U.S. 141; and *United States* v. *Sisson,* 399 U.S. 267). "We cannot see * * * in the circumstances here presented," the court of appeals observed, "[how] the

Government can thread a way through this thicket so long as these decisions stand." (Pet. App. A, p. 29a).

The "thicket," we submit, is not nearly so dense as the majority below suggests. In fact, there is not a single holding of this Court that sustains the conclusion of the court of appeals that an appeal from a post-jeopardy order terminating a criminal prosecution is barred by the Double Jeopardy Clause, merely because the order was "based on facts developed at trial * * * which went to the general issue of the case," where the error may be corrected without a second trial (Pet. App. A, p. 26a). Whether or not each of these cases was correctly decided on its own facts, none of the four cases relied upon by the court of appeals involved our problem. Ignoring other differences, the critical distinction is that—unlike our situation—the further proceedings disallowed in each of those cases, except for *Sisson*, would have required setting aside factual determinations on the merits and would have necessitated a new trial. To be sure, the cases also contain some broad language that can be stretched to reach our case; but to do so we submit, would not be faithful to the context in which the words were written.

What, then, are these cases, said to be controlling here? We consider them chronologically.

1. United States v. *Ball, 163 U.S. 662*

Three men were indicted and tried for murder; two were convicted by a jury and one (Ball) was acquitted. The convictions of Ball's co-defendants were reversed on appeal on the ground that the indictment was fatally deficient in failing to allege that the victim died within a year and a day of the assault. A proper indictment was then returned against Ball, who had been acquitted, as well as his two co-defendants, and all three were retried and convicted. The Court reversed the conviction of Ball on the ground that a subsequent indictment was barred by the Double Jeopardy Clause.

Speaking to the issue "for the first time," the Court announced the rule "that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing" (163 U.S. at 669). While it was also held that Ball's two co-defendants, who had initially been convicted, could be tried again after their convictions had been reversed, the Court held that "Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgment against the other defendants upon the writ of error sued out by them only" (*id.* at 670). And the Court added that such a verdict barred a second trial even if the judgment entered thereon was void (because entered on a Sunday).

So far, obviously, *Ball* entailed nothing remotely relevant to our case. All the Court decided was that an unappealed acquittal that had become final must stand. But in disposing of the issue before it, the Court inserted a gratuitous remark, which we italicize in the following passage (163 U.S. at 671):

> As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, *and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.* However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence. *United States* v. *Sanges,* 144 U.S. 310; *Commonwealth* v. *Tuck,* 20 Pick. 356, 365; *West* v. *State,* 2 Zabriskie, (22 N.J. Law,) 212, 231; 1 Lead. Crim. Cas. 532.

However, even this *dictum* (and it is plainly that) does not carry all the weight it has been asked to bear.[17]

[17] Of the three cases cited by the Court in this passage, not one involved the issue whether the Double Jeopardy Clause barred an appeal from a judgment of acquittal. Indeed, *United States* v. *Sanges*, 144 U.S. 310, the only opinion of this Court mentioned, merely held that in the absence of a statute, the United States could not appeal from an adverse (pretrial) judgment in a criminal case. Indeed, *Sanges* strongly suggested that such an appeal—even from a judgment entered on "a verdict of acquittal"—could be taken if a statute authorized it. In an opinion by Mr. Justice Gray, who also wrote the opinion in *Ball*, the Court in *Sanges* concluded (144 U.S. at 318):

> • • • [T]he decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.

The Court was addressing itself to the issue whether a general jury verdict of acquittal—when not followed by a valid judgment entered upon it—could be invoked as a bar to a "subsequent prosecution for the same offense." In that context, the statement that an acquittal cannot be "reviewed on error or otherwise" suggests no more than that a second trial—in Ball's situation the inevitable outcome of a successful government appeal—cannot be forced on an acquitted defendant by any means.[18] That is, of course, not our case; here no factual determination need be disturbed nor any new trial had.

2. Kepner v. *United States, 195 U.S. 100*

In *Kepner*, also invoked by the court of appeals, the defendant had been tried in the Philippines without a jury and acquitted by the trial judge. Under Philippine law an appeal was authorized from such an acquittal, and the appellate court had the authority to make *de novo* findings of fact on appeal. Citing *United States* v. *Ball, supra,* the Court held that such

[18] For the reasons touched upon briefly in footnote 16, *supra*, we do not accept this correct statement of the *Ball* dictum as a correct statement of the law. However, since respondent will not face a new trial if the district court's action here is ultimately reversed, the issue of the correctness of the dictum need not be argued further in the present case.

a procedure is barred by the Double Jeopardy Clause (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense * * *.

We note, first, that *Kepner* did not involve the Double Jeopardy Clause, but the construction of an Act of Congress, applicable to the Philippines, which incorporated the double jeopardy principle. While it is true that the opinion treats the statutory provision as having the same effect as the Fifth Amendment (195 U.S. at 124), this Court has subsequently admonished that such language is to be regarded as dictum and is not "conclusive" in cases "where the interpretation of the Fifth Amendment is necessarily decisive" (*Green* v. *United States*, 355 U.S. 184, 197, n. 16).[19] Accord: *Hoag* v. *New Jersey*, 356 U.S. 464, 478, n. 3 (dissenting opinion of Mr. Justice Douglas); *Abbate* v. *United States*, 359 U.S. 187, 198, n. 2 (separate opinion of Mr. Justice Brennan).

[19] In *Green* the Court was referring to *Trono* v. *United States*, 199 U.S. 521, a case decided a year after *Kepner*, which also involved an interpretation of the statutory double jeopardy provision applicable in the Philippines.

At all events, *Kepner* cannot be read to bar every appeal from an acquittal. As the Court itself noted, the case was "practically" the same as *Ball* in that a second trial "upon the merits" was sought to be justified. Indeed, under Philippine law, the "review" was effectively a trial *de novo*: the appellate tribunal weighed the credibility of witnesses, made new findings of fact, and entered a judgment of conviction. It requires no elaboration to distinguish that situation from ours, in which, we repeat, no factual determination is challenged and no retrial is necessary. *Kepner* tells us only two things: (1) that an unexplicated acquittal by a judge sitting as trier of fact enjoys the same status as the "not guilty" verdict of a jury; (2) that a second trial after such an acquittal is equally barred whether it takes place in a higher court on the original indictment or in the court of first instance on a fresh accusation. That teaching does not help respondent here.

3. Fong Foo v. *United States*, 369 U.S. 141

Fong Foo involved the entry of a judgment of acquittal in the middle of the government's case, based upon the "supposed lack of credibility in the testimony of the witnesses for the prosecution" and the "supposed improper conduct on the part of the Assistant United States Attorney who was prosecuting the case" (369 U.S. at 142). Although there was no statute authorizing an appeal from such a ruling, the United States obtained a writ of mandamus from the court of appeals directing the district court to vacate the judgment of acquittal and to retry the defendant. In

reversing the order of the court of appeals, this Court held that the "constitutional provision [that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb'] is at the very root of the present case, and * * * that th[is] guaranty was violated when the Court of Appeals set aside the judgment of acquittal *and* directed that the petitioners be tried again for the same offense" (369 U.S. at 143; emphasis added).

Plainly enough, that case is distinguishable from ours. There, unlike here, the judgment attacked, albeit entered by the judge, involved a factual determination on the merits that could not be set aside without requiring a second trial. In those circumstances, the Court held, the "final judgment of acquittal" could not be disturbed even if the judge's intervention was erroneous, premature, even unauthorized.[20] The result—which appears to give greater weight to labels than the Court has more recently condoned (see *United States* v. *Jorn, supra,* 400 U.S. at 478, n. 7; *United States* v. *Sisson, supra,* 399 U.S. at 279, n. 7)—may be questioned.[21] But, for present purposes, it is enough to say that *Fong Foo* is not our case, if only because there a new trial must have followed a successful appeal.

[20] In *Fong Foo*, the United States did not challenge before this Court the dictum in *Ball* that an appeal could not be taken from an acquittal, but argued only that this rule was inapplicable where the district court had no power to enter such judgment and, therefore, the "supposed acquittal, being a nullity, will not support a plea of *autrefois* acquit" (Br. 25, No. 64, October Term 1961). After this argument was rejected (and we believe properly), the Court simply relied upon the uncontested dictum in *Ball* that an appeal, which would place the defendant in jeopardy of a second trial, could not be taken from an acquittal.

4. United States v. *Sisson, 399 U.S. 267*

The last case upon which the majority below relied is *United States* v. *Sisson*. There, after a jury had convicted the defendant of failing to report for induction, the district court terminated the prosecution on the basis of its conclusion that the evidence was insufficient to sustain the defendant's guilt. This Court held that this was in effect an acquittal and that an appeal to this Court was not authorized under the old

[21] It cannot be without some significance in this regard that *Fong Foo* has been cited in but one opinion of this Court in the more than twelve years since it was decided (*Will* v. *United States*, 389 U.S. 90); and, in that opinion, it was cited in a manner which suggests that the Court viewed the decision in *Fong Foo* as reflecting little more than the proposition that, *as a matter of policy*, appeals by the United States in criminal cases are not favored "at least in part because they always threaten to offend the policies behind the double jeopardy prohibition, cf. *Fong Foo* v. *United States*, 369 U.S. 141 (1962)," (389 U.S. at 96), and that, in the absence of a statute authorizing an appeal (389 U.S. at 97, n. 5), "[m]andamus * * * may never be employed as a substitute for appeal in derogation of these clear policies. *E.g., Fong Foo* v. *United States*, 369 U.S. 141 (1962) * * *" (389 U.S. at 97). Of course, even the suggestion in *Will* that appeals by the United States in criminal cases are "something unusual, exceptional, [redacted] not favored" (389 U.S. at 96) is undermined by the present Criminal Appeals Act and its declaration that its provisions are to be construed liberally to effectuate its purpose of permitting an appeal in all cases in which the Constitution permits (18 U.S.C. 3731).

Criminal Appeals Act, which then permitted the government to appeal, after verdict, only from a "decision arresting a judgment of conviction for insufficiency of the indictment."

Of course, insofar as *Sisson* merely construes restrictions, now removed, in the appeal statute, it cannot govern here. But, as the majority below noted, the opinion goes further—without apparent reason. First, the Court characterized the district judge's ruling as "an acquittal" because it was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial" (399 U.S. at 288). Later, the Court repeated the *Ball* dictum about review "on error or otherwise," substituting "acquittal" for the words "verdict of acquittal" in the original (*id.* at 289–290).[22] Putting these two passages together, the court below concluded that *Sisson* ruled our case (Pet. App. A, pp. 23a–25a). We submit that exercise is too facile.

We must remember that there was, after all, no

[22] The whole of the constitutional aside is comprised in the following text and note (*ibid.*):

"Quite apart from the statute, it is, of course, well settled that an acquittal can 'not be reviewed, on error other otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence,' *United States* v. *Ball*, ~~supra~~, 163 U.S. 662, 671 (1896).[18]

"[18] This principle would dictate that after this jurisdictional dismissal, Sisson may not be retried."

occasion to make a constitutional ruling in *Sisson*, and the passage invoked must be treated as gratuitous.[22a] Besides, the opinion does no more than reproduce the *Ball* dictum, which, as we have shown, speaks only to the situation where setting aside an acquittal requires a new trial—which was not what the *Sisson* appeal sought. Nor is the footnote cited by the majority below (399 U.S. at 290, n. 18) relevant here. Of course the Double Jeopardy Clause as construed in *Ball* would bar retrial on a new indictment if the judicial acquittal is allowed to become final. But that does not bear in any way upon the constitutional propriety of permitting an appeal that, if successful, would trigger no new trial. Finally, we are cautioned by three members of the *Sisson* court, dissenting, to doubt whether the majority "really mean[t] to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation [the present Section 3731]"[23] (399 U.S. at 328, n. 4 (dissenting opinion of Mr. Justice White, joined by the Chief Justice and

[22a] "The Government bases its claim that this Court has jurisdiction to review the District Court's decision *exclusively* on the 'arresting judgment' provision of the Criminal Appeals Act * * *" (399 U.S. at 278–279; emphasis supplied).

[23] It is plain from the legislative history of the 1971 amendments to the Criminal Appeals Act that Congress intended to overrule the construction that *Sisson* placed on the old Criminal Appeals Act. ("One example of the kind of case which would thereby be made appealable is the *Sisson* case." S. Rep. No. 1296, 91st Cong., 2d Sess., p. 11; footnote omitted).

Mr. Justice Douglas)).[24] See also *United States* v. *Findley*, 439 F. 2d 970 (C.A. 1), cited with approval in *United States* v. *Brewster*, 408 U.S. 501, 506, where the Court of Appeals for the First Circuit characterized the rationale of *Sisson* as "an approach not in terms of double jeopardy, but in terms of the kind of error [former] section 3731 was intended to cover" (439 F. 2d at 973).

B. DECISIONS OF THIS COURT IN ANALOGOUS SITUATIONS UPHOLD THE APPEALABILITY OF POST-JEOPARDY ORDERS TERMINATING CRIMINAL PROSECUTIONS

Having closely examined each of the four cases invoked by the majority below, we conclude that nothing stands in the way of our submission. But that is not all. Well settled doctrines, consistently approved by this Court, suggest affirmatively that our appeal does not violate the Double Jeopardy Clause. We refer to the practice of this Court in reviewing court of appeals decisions that reverse convictions and to the

[24] In *United States* v. *Jorn*, 400 U.S. 470, Mr. Justice Harlan, who wrote the opinion in *Sisson*, gave substance to the skepticism expressed by Mr. Justice White. In the only portion of the *Jorn* opinion which commanded a majority of the Court (400 U.S. at 489, n. 2), Mr. Justice Harlan not only spoke of *Sisson* as articulating the criterion of an "acquittal" for the purposes of assessing this Court's jurisdiction over an appeal under old 18 U.S.C. 3731 (400 U.S. at 478, n. 7), but he also suggested—without envisioning any apparent constitutional difficulties—that an appeal could be taken from a post-jeopardy dismissal of an indictment under the newly amended Criminal Appeals Act (400 U.S. at 477, n. 6).

long-standing rule allowing appeals from decisions arresting judgment.

In dismissing our appeal here, the court of appeals expressly grounded its decision on the circumstance that the order of the district court was "based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case" (Pet. App. A, p. 26a). Yet that is precisely what occurs every time a petition for certiorari is granted to review a judgment of a court of appeals that directs dismissal of an indictment based on the application of legal principles to facts developed at trial. For example, in *United States* v. *Russell*, 411 U.S. 423, a case illustrative of many others,[25] the court of appeals, relying on evidence developed at the trial, set aside a judgment of conviction on the ground that (*id.* at 424) "an undercover agent supplied an essential chemical for manufacturing the methamphetamine which formed the basis of respondent's conviction," concluding that this constituted entrapment as a matter of law. 459 F. 2d 671, 673 (C. A. 9). Following the definition of the court below in this case, that ruling is as much an "acquittal" as the district court's action here. Yet, when this Court decided *Russell* on the government's petition for certiorari, there was no suggestion that the Double Jeopardy Clause stood in the way. Indeed, the Court long ago declined "to subscribe to * * * a theory" which would bar such relief from an order

[25] See, *e.g.*, *United States* v. *Maze*, 414 U.S. 395; *United States* v. *McGrath*, 412 U.S. 936; *United States* v. *Seeger*, 380 U.S. 163.

of the court of appeals. *Forman* v. *United States*, 361 U.S. 416, 426.

The reason such appellate review does not implicate the policies reflected by the Double Jeopardy Clause is that the trier of fact has found that the defendant has committed the acts charged in the indictment, and a "retrial" is not necessary to correct the legal error of the court of appeals; therefore, the appeal does not put the defendant in jeopardy of a second trial.[26]

The same rationale likewise explains the long recognized practice of appeals from district court orders in arrest of judgment. See, *e.g.*, *United States* v. *Green*, 350 U.S. 415; *United States* v. *Bramblett*, 348 U.S. 503; *United States* v. *Esposito*, 492 F. 2d 6 (C.A. 7), certiorari denied, 414 U.S. 1135. While such post-guilty-verdict orders are for historical reasons entered solely for defects that appear on the face of the record—typically the insufficiency of the indictment to state an offense (see *United States* v. *Sisson*, 399 U.S.

[26] Since the order of the court of appeals merely directs that the judgment of conviction be set aside and that the indictment be dismissed, and since the petition for certiorari may be granted before the district court acts, it could be argued that the Double Jeopardy Clause is not violated because no final judgment has been entered on the court of appeals' determination that the evidence is insufficient to warrant conviction. Such a technical argument, however, not only has nothing whatever to do with the policies reflected by the Double Jeopardy Clause, but it cannot be reconciled with the holding that it is the determination by a jury that the evidence is insufficient to establish guilt—"although not followed by any judgment"—which gives rise to the bar of the Double Jeopardy Clause. *United States* v. *Ball*, *supra*, 163 U.S. at 671. (Of course, even where a district court sets aside a guilty verdict and directs an "acquittal", that order cannot be considered final until the time to appeal has run).

267, 280-287) [27]—it is difficult to understand on what basis the Double Jeopardy Clause can be construed to permit an appeal from a district court order in arrest of judgment, but to bar such an appeal from other, similar post-guilty-verdict orders that accept as true the facts found by the trier of fact and rest on a legal determination that entry of a judgment of conviction is not justified.

The point is forcefully made by Judge Learned Hand in *United States* v. *Zisblatt*, 172 F. 2d 740, 743 (C.A. 2), appeal dismissed, 336 U.S. 934, a case in which the district court entered an order dismissing the indictment on the merits after a guilty verdict had been returned:

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy", but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were

[27] "In England [under the common law] the judge could not * * * direct a verdict of acquittal for legal insufficiency of the evidence: his only power, at least in cases involving felonies, was to recommend royal clemency, which was granted as a matter of course." *United States* v. *Weinstein*, 452 F. 2d 704, 715 (C.A. 2), authorities cited, certiorari denied *sub nom.* *Grumberger* v. *United States*, 406 U.S. 917.

> the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed. So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.[28]

See also *United States* v. *Weinstein*, 452 F. 2d 704 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917, where the court of appeals, per Friendly, C. J., held that the issuance of a writ of mandamus directing the district court to vacate a post-judgment-of-conviction order dismissing an indictment on the basis of facts adduced at the trial "will not subject [the defendant] to *retrial* in violation of his right to be protected against double jeopardy" (452 F. 2d at 712–713; emphasis supplied).

Accordingly, there can be no question that, had the district court here entered a judgment of conviction, and had the court of appeals reversed on the same legal ground that the district court employed, the Double Jeopardy Clause would not have barred further appellate review by this Court. Similarly, as Judge Lumbard stressed here in dissent (Pet. App. A, pp. 31a–41a), no double jeopardy claim would have been arguable if the facts found had been alleged in the indictment and the district judge, after trial, had concluded that the charge did not state an offense. We fail to appreciate what considerations of policy, or arguments of logic, distinguish those cases from ours.

[28] Having concluded, however, that it was without jurisdiction to hear the appeal because a direct appeal to this Court was mandated by the "motion in bar" provision of former Section 3731, the court of appeals certified the case to this Court. The appeal was dismissed on the motion of the Solicitor General solely on the ground that the *statute* did not authorize an appeal from a post-jeopardy order. See *United States* v. *Sisson*, *supra*, 399 U.S. at 306.

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded for determination of the merits of the appeal from the order of the district court.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1513

UNITED STATES OF AMERICA,
Petitioner,

v.

RONALD S. JENKINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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UNITED STATES OF AMERICA,
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v.

RONALD S. JENKINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF FACTS

1. This case was commenced with the return of an indictment on December 21, 1971 charging Ronald Stephen Jenkins with knowingly failing and neglecting to perform a duty required of him under the Selective Service Act and Regulations (Title 50 U.S.C., App. § 462(a)) by knowingly and failing to submit to inducting into the armed forces of the United States,

after notice had been given to the defendant by Local Board No. 50 exercising jurisdiction in that behalf requiring the defendant to report for induction on the 24th day of February, 1971. (Indictment No. 71 CR 1315 of the Eastern District of New York).

On January 13, 1972, Mr. Jenkins was arraigned before Honorable Edward Neaher. 45 days were requested for all pre-trial motions after Mr. Jenkins pleaded not guilty. No pre-trial motions were ever filed in this case and on May 23, 1972, the Government filed its Notice of Readiness for Trial. (App. p. 1)

The trial date was adjourned several times and on July 8, 1972, several papers concerning the upcoming trial were filed. In addition to the motion for judgment of acquittal, a motion concerning the voir dire of the prospective jurors, requests to charge the jury and a trial memorandum of law were filed. (App. 1 and 4). On July 14, 1972, the Government filed opposition papers to the defendant's voir dire and a trial memorandum of law. (App. 2)

On September 22, 1972, a motion for an order to substitute the prosecutor was filed returnable for September 25, 1972 (App. p. 1). On September 25, 1972, the U.S. Attorney was substituted on the grounds that the former U.S. Attorney Thomas Maher would be a witness for the Government (App. p. 1.) On October 3, 1972, the case proceeded to trial with Paul Warburgh representing the Government. In open Court, Mr. Jenkins and his attorney stipulated to the waiving of a jury trial and after a detailed catechism Honorable Anthony Travia permitted Mr. Jenkins to waive jury trial and proceed to trial before the Court without a jury. (App. p. 1 and pp. 5-9).

The Government called two witnesses Elaine Morris, the executive secretary of Selective Service Local Board 50 and Thomas Maher, Assistant U.S. Attorney in the Eastern District of New York, who was formerly Chief of the Legal Division of the New York City Headquarters of the Selective Service System (App. p. 80; pp. 10-45). Mrs. Morris' testimony formed the basis of the Findings of Fact of Judge Travia (App. B42a).[1]

However, it is clear that Mrs. Morris testified on certain points from her personal knowledge of the facts of the case as well as reciting facts outlined in the file. (App. p. 228).

Thomas Maher testified that at the time immediately prior and directly after Mr. Jenkins' induction date he

---

[1] The "Findings of Fact" were as follows:

1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

2. Defendant registered with Local Board no. 50, Brooklyn, New York on September 23, 1966.

3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

4. On January 20, 1971, the defendant was given a preinduction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

(footnote continued)

was the Chief of the Legal Division of Selective Service Headquarters in New York City and that as part of his official duties he had the occasion to become involved in the case concerning Ronald Jenkins (App. p. 38). The Local Board contacted his office in connection with the Jenkins case on February 23, 1971, the day before Mr. Jenkins' induction date, and Mr. Maher gave instructions to the Local Board not to postpone Mr. Jenkins induction date because it appeared on its face that Mr. Jenkins was opposed to a particular war. (App. pp. 40-43 especially). Thereafter, after Mr. Jenkins had not reported for induction on February 24, 1971 and after Mr. Maher had discussed Mr. Jenkins' case with Mr. Jenkins' attorney, the Selective Service file was called into Selective Service Headquarters and the decision was made to return the file to the local board with instructions to refer the case to the U.S. Attorney for prosecution. (App. p. 44). Mr. Maher testified from his personal recollection of the facts with occasional reference to the Selective Service file (App. p. 40, testimony of Thomas Maher).

---

6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board and requested SSS Form 150 for a conscientious objector classification.

7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his request for a postponement of his induction had been denied.

8. The defendant did not report for induction on February 24, 1971.

9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971.

At the close of Mr. Maher's testimony, the Government rested and the case was recessed for lunch. Directly prior to lunch, the following colloquy took place:

> THE COURT: We will go out to lunch and come back.
>
> MR. CARROLL: Fine. I just want to state at this time I made a motion for judgement of acquittal, but I would like to reserve that until the close of my case.
>
> THE COURT: First thing after lunch I was going to ask you if you had any motions. So you can repeat that then. (App. p. 46).

After the lunch break, after the Government was granted leave to reopen its case briefly, for the purpose of introducing an exhibit into evidence, the following colloquy took place:

> THE COURT: Your turn, Mr. Carroll. Do you want to make any motions now at the close of the prosecution?
>
> MR. CARROLL: No, I would like to reserve my right to make motions.
>
> THE COURT: Defendant reserves all rights for all motions ordinarly [sic] made at the close of the prosecutions's [sic] case and you may proceed with your defense.

The defense put on three witnesses–Ronald Jenkins, the defendant; Jerome Bibuld, Mr. Jenkins' draft counselor; and Mrs. Phyllis Bates, Mr. Jenkins' mother. Prior to Mr. Jenkins' testimony there was discussion off the record as to the possibility of a disposition before the defense put on its case (App. p. 48). However, Mr. Jenkins insisted on going forward and trying the case (App. pp. 48-49).

Mr. Jenkins' testified that after he received the induction order in February 1971, he spoke to a draft counselor, Mr. Jerome Bibuld, and after speaking to him about conscientious objection for some time, he realized that he could not submit to induction, into the armed forces, because he was opposed to war (App. pp. 51-52). Thereafter, Mr. Jenkins requested a postponement of his induction. Although the postponement of induction was denied on February 23, 1971, Mr. Jenkins was given a C.O. Form 150 which he completed and returned. (App. p. 50). During the direct examination of Mr. Jenkins the Court intervened frequently to determine whether Mr. Jenkins' testimony was credible or not (App. pp. 49-62).

The next prospective witness was Jerome Bibuld, Mr. Jenkins' draft counselor. Mr. Bibuld's testimony, however, was never elicited, since the Government requested an offer of proof which was proffered by defense counsel and the offer of proof was denied by the Court.[2] (App. pp. 70-75).

Mrs. Bates the registrant's mother testified to facts relating to Mr. Jenkins' claim that his medical exemption was improperly denied and the defense rested directly thereafter. After the close of the defendant's case both sides rested and the court

[2] The Government suggests in its brief at page 15 that "there has been no showing that he in fact was aware of or relied upon the case law . . . ' Respondent never suggested such an excuse, although both he and his 'counselor testified at the trial." This is belied, however, by the fact that Mr. Jenkins' counselor did not testify at the trial although he was called as a witness and that the court precluded the line of questioning which would have shown that Mr. Jenkins was aware of the case law in the Second Circuit at the time and that he was relying upon this law).

reserved decision and gave both sides the opportunity to submit Findings of Fact and Conclusions of Law.

On October 24, 1972, the Court filed its Findings of Fact and Conclusions of Law (See App. 2; App. B, pp. 42a-52a; and *supra*). At the conclusion of the discussion, the Court stated that: "The indictment in this case is dismissed and the defendant is discharged."

The lower court warned, however, that:

> "in closing this court must emphasize that its decision with respect to the defendant must not be overread. In this case, Jenkins would be clearly prejudiced by any attempt to apply, retroactively, the Supreme Court's decision in Ehlert. This Court cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law. This is not to say, however, that under other circumstances a retroactive reading of *Ehlert* would not be warranted. (App. B. p. 52).

After exploring other cases from other circuits dealing with the applicability of *Ehlert*, the court had previously stated in its discussion, in finding that they were not controlling that:

> "Accordingly, those defendants would not be prejudiced, as the defendant Jenkins would be by a retroactive application of *Ehlert*; when they refused induction, they had not been apprised of the fact, through the interpretation of § 1625.2 in that circuit, that they would have to be heard by the Board on their claims.

The appeal to the Court of Appeals was commenced on November 21, 1972 with the filing of a Notice of Appeal by the Government. After argument by counsel, the Court of Appeals dismissed the appeal stating that:

"Although the district judge here characterized his action as a dismissal, it is clear from the analysis in *Sisson* that for double jeopardy purposes he acquitted the defendant. His ruling was based on facts developed at trial, which were not apparent on the face of the indictment and which went to the general issue of the case.

The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district's court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in Ehlert should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in Ehlert and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact."

2. This petition was filed by the Government on April 8, 1974, and was granted on May 28, 1974 along with the petition in *United States v. Wilson*, No. 73-1393 and the two cases were set down for argument in tandem. Respondent contends that under Title 18, U.S.C., § 3731 the lower court did not have jurisdiction to hear and determine the appeal from the district court's judgment.

ARGUMENT

THE COURT BELOW WAS CORRECT IN ITS DETERMINATION THAT IT DID NOT HAVE JURISDICTION TO HEAR AND DETERMINE THE APPEAL FROM THE LOWER COURT'S JUDGMENT UNDER TITLE 18 U.S.C., SECTION 3731 AND THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

This case presents no novel thesis to be determined by the court. In fact, except for the torture of the facts to which the Government has subjected this case, the essential legal issues have been determined time and time again by this court and by lower courts. *United States v. Ball*, 163 U.S. 662 (1896); *Kepner v. United States*, 195 U.S. 100 (1904); *Fong Foo v. United States* 369 U.S. 141 (1962); *United States v. Sisson*, 399 U.S. 267 (1970); *United States v. Brewster*, 408 U.S. 501 (1972); *United States v. Hill*, 473 F.2d 759 (Ninth Circ. 1972). The Criminal Appeals Act, Title 18 U.S.C. section 3731 and the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution forbid the Government from appealing from the district court judgment in the instant case.

Title 18 U.S.C., section 3731 reads that:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. . .The provisions of this section shall be liberally construed to effectuate its purposes."

In Title 18, USC, section 3731, it appears that Congress intended to extend the Government's right to appeal in criminal cases as far as it constitutionally could. *United States v. Jenkins*, 490 F.2d 868 (1973) (See Government's Appendix A-5a); Report of the Senate Committee on the Judiciary, 91st Congress, 2nd Session, No. 91-1296 at 9-13; Whether or not the Double Jeopardy Clause is coterminous with section 3731, the appeal in this case is barred by the Double Jeopardy clause and derivatively by Section 3731.

The general rule as to when a defendant has been put in jeopardy is technical but settled. In *United States v. Hill*, 473 F.2d 759 (Ninth Circ. 1972) quoting from *McCarthy v. Zerbst*, 85 F.2d 640 (10th Cir. 1936), the court states at page 761:

> "The general rule is that a person is not in jeopardy until he has been arraigned on a valid indictment or information has pleaded and a jury has been impaneled and sworn; and where a case is triedl [sic] to a court without a jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and the court has begun to hear evidence"

There is no doubt that jeopardy attached in Jenkins' case. He was indicted by a validly constituted Grand Jury and the indictment was valid on its face; he knowingly waived his right to trial by jury and proceeded to trial before the court (See Appendix 5-9 and Statement of Facts, *supra*); witnesses were sworn and testified and the trial proceeded to final judgment without interruption.

It is well settled also that a verdict of acquittal cannot be reviewed by an appellate federal court without violating the Fifth Amendment. *United States v. Sisson, supra; United States v. Ball, supra.* This is true whether the case is tried before the court and a jury or the court acting as a fact finder. *Kepner v. United States, supra.* Those cases dispose of the issue at bar and your respondent would feel content to rest after having cited them except that the Government has called the continuing validity of these cases into issue and their applicability to the instant case. Before discussing the cases, however, the Government establishes its thesis.

The Government does not call into questions the principle that a factual determination on the merits which acquits the defendant, whether made by judge or jury, insulates the defendant from further proceedings. The Government, however, questions whether, if a judge acquits a defendant on purely legal grounds whether such an acquittal bars further review when a retrial is not required (Petitioner's Brief, p. 10). The Government contends that its thesis invokes no novel doctrine. (Petitioner's Brief, p. 10). However, it should not go without notice that the petitioner does not cite a single case to support its proposition.

THE TRUE DISTINCTION BETWEEN FINDINGS OF FACT AND RULING ON THE LAW.

The petitioner points out first in support of its thesis that the district judge made a purely legal ruling and that the facts were not in dispute. Therefore, all that is necessary is for this Court to correct the district court's "erroneous" application of the law to the facts. There

are several problems with this position not the least of which is whether a truly workable distinction can be made between a decision on the facts and one on the law.

There is no doubt, for example, that the district court considered the individual facts and circumstances of Jenkins' case and was not making a ruling that the indictment was insufficient on its face as a matter of law. Thus, as stated by the court of appeals the district judge's

> "ruling was based on facts developed at trial which were not apparent on the face of the indictment, and which went to the general issue of the case".

A fact finder frequently makes rulings on the applicability of facts to law. A jury being charged by the court on the law with regards to the self defense will make a determination as to whether the facts support such a defense. Such a determination by a jury would be reflected in a general verdict of guilty or not guilty. This verdict, however, would not be articulated in open court regardless of whether it was based upon an erroneous interpretation of the law or not. As such, it would be unassailable and could not be reviewed in any subsequent proceeding. *United States v. Ball, supra.*

It is not illogical for it to be any different when the fact finder is the court and not a jury. The court acting as fact finder does not have the luxury of being mute as to the rationale of how the law fits the facts found. The court must submit findings of fact and conclusions of law. However, the ultimate determination made after discussion as in this case, is whether the particular defendant is guilty or not guilty of the offense charged.

In the instant case, the district court made a determination as to whether *Ehlert v. United States*, 402 U.S. 99 (1971) applied to Ronald Stephen Jenkins. As such, it may be denominated a ruling on the law. On the other hand, the district court very clearly was not making a statement as to the retroactivity of *Ehlert* as such, but was stating that it was inequitable under the circumstances of this particular case to find that Jenkins was guilty of failing to report for induction without eroding fundamental principles of our jurisprudence. See *supra* and App. B, p. 52A.

The district court's findings of fact and conclusions of law in this case were consistent with the motion that the defendant made for judgment of acquittal. The defendant had requested that the court consider three grounds for granting judgment of acquittal to the defendant. Two of them were based upon the conduct of the local board in denying Mr. Jenkins' claim as a conscientious objector and failing to postpone his induction. The third claim however, dealt with Mr. Jenkins' conscience, stating that Mr. Jenkins "did not intentionally fail to submit to induction but was in fact acting in accordance with his conscience and belief in awaiting a determination by the Local Board as to his C.O. claim". (App. 4). The respondent contends that the district court was considering the third point raised by the defendant in the district court level when the court stated that serious and basic equitable principles would be eroded by applying *Ehlert* without qualification to Mr. Jenkins. Otherwise, why would registrants in circuits that had not followed the rule in *United States v. Geary* 368 F.2d 144 (2nd Cir. 1966) not be prejudiced as Jenkins would be by a retroactive application of *Ehlert*? As the district court

stated, when they refused induction they had not been apprised of the fact, through the interpretation of §1625.2 in that circuit, that they would have to be heard by the Board on their claims. App. B. p. 50A. One must remember that Jenkins at the time of his failure to submit to induction was represented by an attorney and had previously consulted with a draft counselor. It would not be outside of the facts for the district judge to consider this in determining whether Jenkins had knowledge of the law of the Second Circuit on February 24, 1971. This is in fact exactly what the district court did. (App. B. p. 50a). This assessment of Jenkins' knowledge or intent in not taking the symbolic one step forward is completely contrary to the petitioner's assertion that the result did not turn on credibility or demeanor. (Petitioner's Brief, P. 12).

Another problem with Petitioner's position, though, is that the distinction between an acquittal on the facts and a pure ruling on the law has not been previously articulated by the Court. *United States v. Sisson, supra; United States v. Weller*, 401 U.S. 254 (1971) on remand 466 F.2d 1279 (9th Cir. 1972); *U.S. v. Brewster, supra.* The foregoing cases stand for the proposition that a reviewing court does not have jurisdiction under 18 U.S.C. section 3731 when a dismissal is based on evidence adduced at trial and not on factual conclusions found in the face of the indictment. When the general questions of guilt or innocence to the charge are put in issue and the trial judge dismisses the indictment, a subsequent appeal by the Government violates the double jeopardy clause. *U.S. v. Hill*, 473 F.2d 759 (9th Cir. 1972).

In *United States v. Brewster, supra*, the interpretation of former section 3731 was in issue.[3] The district court on a pre-trial motion had dismissed the indictment against the former United States Senator defendant on the ground that the Speech or Debate Clause of the Constitution shielded him from prosecution for alleged bribery to perform a legislative act. The Government took a direct appeal to this court under former section 3731. Although the Court allowed the appeal, it stated the rule under *United States v. Sisson, supra* (See discusison infra) to be that:

> "an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone but upon extraneous facts. If an indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment which facts would constitute a defense on the merits at trial, no appeal is available"
> 408 U.S. at p. 506.

It is unclear whether the decision in *Brewster* was based upon §3731 as it then read or on the double jeopardy clause itself. Its reliance upon Sisson and

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[3]Title 18 U.S.C. §3731 (1964 ed. Supp. U) provided in pertinent part: "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

> "From a decision or judgment setting aside, or dismissing any indictment or information or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is formed.
>
> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy").

particularly the quoted phrase in Sisson seems to suggest otherwise. (See discussion of *Sisson infra*). Other cases from the various circuits make it clear that the distinction between an acquittal on the facts and a pure ruling on the law has not been treated as significant.

In *United States v. Hill, supra*, for example, the Ninth Circuit Court of Appeals held that the double jeopardy clause foreclosed review of the trial court's dismissal of an indictment prior to trial. After a pretrial hearing, the trial court dismissed the indictment which had charged the defendants with knowingly depositing obscene advertisement in the mail. The dismissal was based on the court's determination that *as a matter of law* the material was not obscene. The court of appeals, after reviewing the general rule as to when jeopardy attached, stated:

> "Having considered the evidence, the court rules, as a matter of law that the matter was not obscene, The Court did not hold that the indictments were defective. On their faces, they were valid. What the Court held in substance, was that the defendants before it were not guilty. 473 F.2d at p. 761.

In Hill, the court did not base its decision on an artificial distinction between a decision on the facts and a decision on the law. What was important to the court and for double jeopardy purposes was that facts outside of the indictment going to the general questions of guilt or innocence of the charge were elicited at the hearing.

Also of importance are several cases from the various circuits which deal with the appealability of district court orders dismissing indictments in selective service

cases after consideration of facts contained in the registrant's file. The following decisions have held that such a pretrial dismissal of an indictment is not appealable. *United States v. Ponto*, 454 F.2d 657 (Seventh Circuit, 1971); *United States v. Findley*, 439 F.2d 970 (First Circ. 1971); *U.S. v. McFadden*, 462 F.2d 484 (Ninth Cir. 1972); *U.S. v. Weller*, 466 F.2d 1279 (Ninth Circ. 1972); *U.S. v. Rothfelder*, 474 F.2d 606 (Sixth Cir. 1973).

In *U.S. v. Ponto, supra*, the Seventh Circuit Court of Appeals convened *in banc* concluded that the Government had no right to appeal from the pre-trial dismissal of the indictment in two separate selective service cases. The ruling was based both on §3731 and on the double jeopardy clause.

After an extensive review of section 3731, since amended, the court concluded:

> "An objection to the local board's classification of a registrant can be raised as a defense to a prosecution under 50 U.S.C. App. §462. . .The motion in the instant case presented questions concerning Ponto's classification, which are raised only by defense. The decision to dismiss by the district judge was based on questions presented by this defense. As such, it was a ruling on the merits of the defense. . .
>
> "Since the dismissal order was based on a determination on the merits, it was an acquittal to which jeopardy attached. . . .Thus government appeal from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited. . . .*We view this as an independent ground for holding that the government may not appeal in this case* (Emphasis mine) 454 F.2d at p. 664.

There were three dissenting judges in the *Ponto* case. They rested their opinions, however, on the fact that jeopardy had not attached since the trial had not commenced. This of course is not the situation in the present case.

In concluding on this point, counsel reiterates that the Petitioner's position that the district judge had made a purely legal ruling in dismissing the indictment and that an appeal was therefore permissible is untenable. Such a distinction is easy to articulate but not viable; the district court judge went deeply into the facts of the case and considered Ronald Jenkins' intention and knowledge of the existing law in the Second Circuit, in holding in Mr. Jenkins' favor; the district judge's dismissal was based on facts developed at trial which were not apparent on the face of the indictment and which went to the general issue of guilt or innocence and according to relevant authority such a ruling cannot be reviewed by appeal or otherwise.

THE TURE CHARACTERIZATION OF THE DISTRICT JUDGE'S RULING.

Judge Travia's conclusion after extensive discussion of Jenkins' case was:

> "The indictment in this case is dismissed and the defendant is discharged." Petitioner's App. B. p. 52A.

The characterization that the district court judge gives to his action is only the beginning and not the end of the inquiry as to what actually occurred. This is the teaching of *United States v. Sisson* 399 U.S. 267

(1970) in which the Court found that the district judge's characterization of his action as an arrest of judgement was incorrect and that what had actually occurred was that the district judge had acquitted the defendant. The court below agreed with this approach and held that the district judge had acquitted Jenkins. Apparently, the Government does not disagree with the characterization of the court of appeals, but states that whether the lower court's action is a dismissal or an acquittal is irrelevant for double jeopardy purposes. (Government's Brief, p. 13). The Petitioner analogizes the action of the district judge as being of the same character as an order arresting the judgment, a judgment ordered on special jury findings or the decision of the appellate court. (Government's Brief, p. 14). With this, the government concedes too much.

In *United States v. Sanges*, 144 U.S. 310, it was held that the Government could not appeal from a pretrial dismissal of an indictment absent an enabling statute. The Petitioner, conceding that the district judge's action was an acquittal, does not indicate under what authority the Government is able to appeal from an acquittal of the defendant. The Government cannot have its cake and eat it too. Either the district judge's decision was a dismissal of the indictment with all of the concomitant problems under *United States v. Sisson, supra*, or it was an acquittal from which no appeal is allowed since there is no statute enabling the Government to appeal from an acquittal.

In *Sisson* the Court explored whether the district court judges action was actually an arrest of judgment. The Court concluded that it was not an arrest of judgment since a judgment can only be arrested on

the basis of error appearing on the face of the record and not on the basis of proof offered at trial and that the court's adverse decision was not for insufficiency of the indictment. See Petitioner's Appendix A, p. 22a. Clearly, the same considerations apply to the instant case. According to *Sisson* and using the criteria for characterizing the judgment found in that case, the action of the district judge was not an arrest of judgment or a dismissal of the indictment but an acquittal.[4]

WHETHER A NEW TRIAL WOULD BE REQUIRED IF THE CASE WERE REVERSED.

The argument under this point is approached with the same uneasiness that one might approach the answer to the question "Are you still beating your wife?" Thus, a yes or no answer involves some admission of wrongdoing. In fact, whether a retrial would be required on reversal or not is a misleading question, since it is not relevant whether a retrial is required or not for double jeopardy purposes. As stated in *United States v. Ball, supra*, a verdict of acquittal is final and could not be reviewed on error or otherwise without putting an individual "twice in jeopardy and thereby violating the Constitution". *Ball, supra* at p. 671, *Kepner v. U.S.*, 195 U.S. 100 (1904).

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[4]It certainly must be relevant to this inquiry, although not dispositive, that at no time did counsel request the district court to dismiss the indictment but was quite consistent in requesting that the district judge acquit the defendant.

If the Court is to determine that whether a retrial is necessary or not is relevant for double jeopardy purposes the respondent brings to light the following considerations. The court below recognized that a possible defense that could be raised on retrial is that the registrant "reasonably relief in good faith on the case law or upon the knowledge that local boards in this circuit would consider a belated conscientious objection claim." App. A, p. 28a, quoting from *United States v. Mercado*, 478 F.2d 1108 at P. 1111 (2nd Cir. 1973). Respondent in no way waived this defense at the lower court level as the Petitioner seems to suggest.

In fact, at the trial the respondent called Jerome Bibuld, Mr. Jenkins' draft counselor as a witness. The Government requested an offer of proof and when counsel suggested that Mr. Bibuld would testify as to his discussion with Mr. Jenkins with regards to his conscientious objection claim, the court excluded the witness' testimony. The district court stated in support of its decision:

> "THE COURT: What do we need this testimony for? Did they have the right to close off then and not consider it? That to me is a question of law here, not further proof.
>
> MR. CARROLL: I object to that. I except to that.
>
> THE COURT: I will deny the offer of proof if that offer of proof is directed in that area of adding testimony which would have, say, built up his claim which had been by the Board denied to be reviewed.
>
> All right, that's out. Denied"
> App. p. 74.

Thus, the testimony of the draft counselor who would have testified as to Mr. Jenkins' intent on and immediately before February 24, 1971 was excluded by the district court on the grounds that the testimony would be redundant.

Prior to Mr. Bibuld's taking the stand the registrant had testified that he had spoken to Mr. Bibuld prior to February 24, 1971 but after February 4, 1971, the date that the induction order was mailed out. The registrant testified in part as follows:

> "Q. Could you please tell us what transpired when you saw Mr. Bibuld?
>
> A. Well, we did, you know, the usual questions, information that I related to the induction order and during the course of our discussion the matter of conscientious objection, you know, was brought to my attention. Prior to that time, I wasn't aware of the definition for conscientious objection nor of my rights under the Selective Service Laws." App. p. 51.

The registrant was thus testifying that his beliefs as to conscientious objection had crystallized after his induction order was received but before induction and that he was aware of his rights under the Selective Service Act with regards to claiming such exemption prior to February 24, 1971.

The questions then as to whether a retrial would be required upon reversal of this case is a non-sequitur. Even if this is relevant, however, the case would have to be remanded for retrial because the district court was not aware at the time that the registrant's intent could

be raised in defense to an indictment under 50 U.S.C. App. section 462.[5]

THE THICKET THROUGH WHICH THE COURT MUST WADE.

The Petitioner suggests that the thicket of cases through which the court must wade to find that the court of appeals had jurisdiction to hear the appeal in the instant case is not so thick after all. Respondent disagrees and contends that a fence or wall has been constructed between the petitioner and its position by the following cases: *United States v. Ball*, 163 U.S. 662 (1896).

In *United States v. Ball, supra*, two individuals by the name of Ball and one individual by the name of Boutwell were indicted for the murder of William T. Box, in an indictment charging that the defendants being white men and not Indians, on June 26, 1889 in Pickens County, in the Chickasaw Nation in the Indian Territory did unlawfully and with malice aforethought shoot the contents of a gun in Box's body and as a result Box died. The three defendants were arraigned

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[5]The issue of whether a retrial would be necessitated is further complicated by the uncertainty arising under Presidential Proclamation 4313. September 16, 1974 (Weekly Compilation of Presidential Documents, vol.10, No. 38) This Proclamation established a program for the return of Vietnam Era Draft Evaders and military deserters. It has not yet been determined what its effect will be on a defendant who has been acquitted of violation of the Selective Service Act and Regulations (Title 50 U.S.C. App. §462(a)) and whose case is on appeal by the government, as in the instant case.

and after trial by jury, Millard Fillmore Ball was acquitted by jury verdict and J.C. Ball and Boutwell were convicted by jury verdict. The jury verdict was delivered on Sunday and Millard F. Ball was discharged on the same day. Later during the same term, the two other defendants were sentenced to death. These two defendants appealed the judgment on the grounds that the indictment was insufficient since it did not allege when and where William T. Box died. The court reversed the conviction on the grounds that the indictment was deficient and remanded with instructions to quash the indictments. *Ball v. United States*, 140 U.S. 118 (1890). All three defendants were reindicted and retried.

Prior to the second trial Millard Ball filed a plea of former jeopardy and former acquittal (autrefoits acquit). J. Ball and Boutwell prior to the second trial filed a plea of former jeopardy and conviction. (autrefoits convict). Both pleas were rejected and the defendants were retried on a plea of not guilty. After trial, the jury returned a verdict of guilty of murder against all three defendants. Each defendant was adjudged guilty and sentenced to death and all three sued out writs of error.

The first matter that the Court considered and the only matter that is relevant to our consideration here was the effect of the acquittal on Millard Ball. In this context the court considered as background the English rule as enunciated in *Vaux's Case*, 4 Rep. 44. In that English case, it was held that after an acquittal on an invalid indictment, Vaux could be retried since he was never in the judgment of the law ever put in jeopardy by being tried on an insufficient indictment. *Vaux's Case, supra; U.S. v. Ball, supra*, at 667. The Court,

however, considered that such a position would be unjust if followed in this country since it would allow the prosecutor to raise his own ineptitude in failing to properly indict the defendant on an appeal. *Ball, supra* at 668. After full consideration of the issue, the Court stated that it was unable to resist the conclusion that:

> "A general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect is a bar to a second indictment for the same killing". *Ball, supra*, at p.669.

Further, the Court stated:

> "Millard F. Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgement against the other defendants upon the writ of error sued out by them only." *Ball, supra* at p.670.

Finally, in disposing of the issue and discharging Millard F. Ball, the Court concluded:

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise without putting him twice in jeopardy and thereby violating the Constitution. However, it may be in England, in this country, a verdict of acquittal although not followed by any judgement is a bar to a subsequent prosecution for the same offence. *United States v. Sanges*, 144 U.S. 310 and other cases cited herein at *Ball, supra* at p. 671.

The Government characterizes this as mere dictum in their brief. Petitioner's Brief, p. 28. However, it is clear

that the Court was dealing with the issue of reversal of Millard F. Ball's acquittal by the appeal taken by his two co-defendants. It is also clear that the Court considered extensively the existing British rule as enunciated in *Vaux's Case, supra,* which allowed such appeals and the Court rejected the British rule. Therefore, its statement that no review was allowed of a general verdict of acquittal by error or otherwise was not mere dictum but the holding of the case. To underline this point, the Court in subsequent cases treated the "dictum" of *Ball* as its holding.

KEPNER V. UNITED STATES, 195 U.S. 100 (1904)

In *Kepner v. United States, supra,* the question whether a provision against double jeopardy embodied in an Act of Congress for the government of the Philippines (32 Stat. 691 [1902]) prevented a Government appeal after an acquittal at trial was raised. Kepner was a Philippine attorney who had been acquitted of the charge of embezzlement after trial before the court. On Appeal to the Supreme Court of the Philippines Kepner's acquittal was reversed, he was found guilty and sentenced. The Court reversed the conviction and held that an acquittal in the trial court barred review on appeal by the Government and that this was true whether trial had been before the court or jury and whether Philippine custom had been otherwise or not.

The Court stated in pertinent part that:

> "The Court of first instance, having jurisdiction to try the questions of guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court is to put him a second time in jeoparty [sic] for the same offense if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well settled sense as declared and settled by the decisions of this court"
> *Kepner, supra* at p. 133.

In *Kepner,* the Court had under its consideration an Act of Congress that prohibited a defendant from being put twice in jeopardy for the same offense. Also, in contradistinction to the statute was a military order (No. 58 as amended by act of the Philippine Commission, No. 194 – See *Kepner* at p. 133) which purported to give the Government the right to appeal from acquittals. There was an extensive discussion of Philippine custom which was based on Spanish Civil Law in which jeopardy was continuous until the court of last resort had ruled. After this discussion, however, the Court concluded that it was Congress' intent to give the Philippines the protection of our Bill of Rights regardless of Philippine custom. Under our Bill of Rights, the Court stated quoting from *U.S. v. Ball, supra,* an acquittal could not be reviewed by error or otherwise, *Kepner, supra* at p. 131 quoting from *U.S. v. Ball, supra* at p. 671.

Although the Government in their brief (Pet. Brief, p. 30) stated that since *Kepner* involved the interpretation of an Act of Congress and not the Constitution its interpretation cannot be binding on this

Court's interpretation of the Fifth Amendment. This might be true under other situations, but certainly not when the *Kepner* court made it clear that it was interpreting the Fifth Amendment and not merely an Act of Congress.

> "When Congress came to pass the Act of July 1, 1902, it enacted almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the president declared to be established as rules of law for the maintenance of individual freedom at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.
>
> "How can it be successfully maintained that those expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense then that which has been placed upon them in construing the instrument from which they were taken?"

FONG FOO V. UNITED STATES, 369 U.S. 141 (1962)

In this case three government witnesses had already testified and a fourth was in the middle of his

testimony when the district judge stopped the proceedings. Thus far, the situation is similar to one in which a mistrial is declared in the middle of trial. If there is a manifest necessity for the declaration of the mistrial, it is settled that the defendant can be retried since he was never in jeopardy. *United States v. Jorn*, 400 U.S. 470 (1971); *Illinois v. Sommerville*, 410 U.S. 458 (1973). In *Fong Foo*, however, the district court judge did something unusual. Instead of declaring a mistrial, he stopped the trial and directed the jury to come in with a verdict of acquittal. A formal judgment of acquittal was subsequently entered. The record reveals that the judge directed acquittal on two grounds: 1) the lack of credibility of government witnesses; 2) the misconduct of the prosecutor.

The Government filed a petition for writ of mandamus to the Court of Appeals for the First Circuit, praying that the judgment of acquittal be vacated and the case reassigned for trial. The Court of Appeals granted the petition upon the ground that under the circumstances the court was without power to take the action that it did.

This Court rejected the reasoning of the Court of Appeals since the decisions that the court of appeals relied upon (*Ex Parte United States*, 242 U.S. 27 and *Ex Parte United States*, 287 U.S. 241) did not involve the double jeopardy clause. The decision is short and the respondent quotes it in large part:

> "Neither of those decisions involved the guaranty of the Fifth Amendment that no person shall be subject for the same offense to be twice put in jeopardy of life or limb'. That constitutional

provision is at the very root of the present case and we cannot but conclude that the guaranty was violated when the Court of Appeals set aside the judgement of acquittal and directed that the petitioners be tried again for the same offense.

"The petitioners were tried under a valid indictment in a federal court which had jurisdiction over them and the subject matter . . . The Court of Appeals thought, not without reason, that the acquittal was based upon an agregiously erroneous foundation. Nevertheless, the verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy and thereby violating the Constitution.' ".
Fong Foo at p. 631 citing *U.S. v. Ball, supra.*

The Government distinguishes *Fong Foo* on the grounds that it is not our case, if only because there "a new trial must have followed a successful appeal." Petitioner's Brief, p. 33. Respondent does not maintain that *Fong Foo* is the same case as *Jenkins.* In fact if anything, *Jenkins* is much stronger than *Fong Foo* as far as the Fifth Amendment guarantee is concerned. This is true because Jenkins waived trial by jury, proceeded to trial before the court which made findings of fact and conclusions of law and entered final judgment in favor of the defendant. *Fong Foo,* to the contrary, was very close to a mistrial situation distinguished by the fact that the judge terminated the trial in a very unique manner and made a special finding as to the credibility and demeanor of the Government's witnesses.

Fong Foo also reveals the weakness of the Government's position with regards to the necessity or lack of necessity for a retrial. The Government makes

much of the fact that the *Fong Foo* court stated that the Fifth Amendment guarantee was violated when the court of appeals set aside the judgment of acquittal *and* directed that the petitioners be tried again. However, if the court of appeals had held in favor of the defendants originally, this court would have never had the occasion to discuss whether a retrial would have been required or not. The decision as to jurisdiction and the decision as to the necessity or lack of necessity for a retrial are two separate and distinct inquiries. The first is an inquiry as to the power of the court to review the matter at hand in the first place. The second decision as to the necessity for a retrial is intrinsically linked with a finding that jurisdiction exists and that the lower court was in error. However, the second issue cannot be reached without a determination on the first issue. However, in determining the first issue, jurisdiction clear and simple, it is not necessary to inquire into the second. Since the two considerations are divorced from one another, it unnecessarily confuses the issue to ask this court to determine *before* reaching the issue of jurisdiction whether the decision on the merits was correct or not.

UNITED STATES V. SISSON, 399 U.S. 267 (1970)

Sisson was indicted in the District of Massachusetts for wilfully failing to report for induction as ordered by the local board. He moved to dismiss the indictment prior to trial on several grounds all of which were denied by the district court and the case proceeded to trial before a judge and jury. The judge's instructions to

the jury advised the jurors that the crux of the case was whether the defendant's refusal to submit to induction was 'unlawful, knowingly and wilfully' done. The jury found the registrant guilty. Thereafter, a motion to arrest and judgment on the ground that the district court lacked jurisdiction was made. The Court granted the motion on several grounds one of which was that the Free Exercise and Due Process clauses prohibited application of the Military Selective Service Act to Sisson because as a "sincerely conscientious man" his interest in not killing in Vietnam outweighed "the country's present need for him to be so employed". Sisson had satisfied the judge during the course of his trial that he had genuine objections to fighting in Vietnam founded on moral values derived from religious writings and philosophical beliefs and the court's decision was therefore a decision as to the wilfullness of Sisson in refusing induction; and that Section 6i of the Selective Service Act violated the Constitution.

The Government appealed to this Court under former section 3731 (See *supra*) and the Court dismissed the Government's appeal for lack of jurisdiction. Despite the language of the district court, this Court held that the district court's order was not one arresting the judgment but an acquittal on the merits. The Court reached this conclusion because the decision was not based on the insufficiency of the indictment nor on the basis of error appealing on the face of the record. *Sisson* at p. 281 and 287-288.

As stated at page 288 of 399 U.S. at the commencement of Part IIC of the opinion which had a majority of the court:

> "The same reason underlying our conclusion that this was not a decision arresting judgement – i.e. that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial – convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty".

Whether the judge's constitutional theory was erroneous or not was irrelevant according to the Court. If a judge had given erroneous instructions to a jury similar to the district court's decision to "arrest the judgment, the jury's verdict on such instructions could not be disturbed. As such, the judge's decision could not be disturbed in this case without violating the double jeopardy clause.

> "Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise without putting [the defendant] twice in jeopardy and thereby violating the Constitution. . . . In this country a verdict of acquittal, although not followed by any judgement, is a bar to a subsequent prosecution for the same offence.
> *United States v. Ball*, 163 U.S. 662 (1896)" *Sisson* at pp. 290-291.

The Court's decision in *Sisson* did not rest on the fact that the judge *could* have sent the case to the jury (as per the hypothetical situation) but rather on what the district court did – "i.e. render a legal determination on the basis of facts adduced at trial relating to the general issue of the case". *Sisson, supra* at p. 301. (In Green the Court was referring to *Trono v. United States*, 199 U.S. 521, a case decided a year after

Kepner, which also involved an interpretation of the statutory double jeopardy provision applicable in the Philippines.)

Whether a new trial was requested or not in *Sisson* as in the other cases discussed is completely irrelevant. Since, however, the Government has made this an issue, it can be stated that the Court had stated that *Sisson* could not be retried after the dismissal for lack of jurisdiction. *Sisson, supra*, at p. 290, footnote 18). The Government in its Brief, indicated that a retrial was not sought in *Sisson* by the Government. Yet, that is exactly the situation in the instant case, but *Sisson* held that there was no jurisdiction for the appeal in an analogous situation where no new trial was sought. If the fact that the Government was or was not seeking a new trial was not considered relevant in *Sisson*, there is no reason why it should be relevant consideration in Jenkins.

In fact, *Sisson* is dispositive of the issue. The judge made a legal determination on facts adduced at trial going to the general issue of the case and no new trial was requested by the Government. This is *Jenkins'* case (although arguably if there is a decision on the merits and it is unfavorable, a new trial *would* be necessary).

As much as the petitioner may try, *Sisson, Fong Foo, Kepner, Ball* and their progeny bar the appeal in the instant case. The only other issue that need be discussed is whether analogous situations point to the conclusion that the Court of Appeals had jurisdiction in this case. Many things may be said about analogies to a particular situation, but one thing is certain. Some may be strong and others weak but they are all analogous and by definition not directly on point.

ANALOGOUS AREAS SEEMINGLY IMPLICATING THE DOUBLE JEOPARDY CLAUSE.

No double jeopardy claim is advanced when a court of appeals reverses a judgment of conviction of a district court. Jeopardy does not attach for double jeopardy purposes once an individual has, in a manner of speaking, run the gauntlet and lost. Any subsequent proceedings in such a case are simply that – subsequent proceedings. Therefore, rulings in such cases do not truly involve the double jeopardy clause and are not directly on point. *United States v. Russell*, 411 U.S. 423, is not directly in point for that reason although it might be interesting to examine such cases as an exercise in the logical operation of deduction without one of the premises.

The same rationale, your respondent is certain, applies to district court orders in arrest of judgment. Such orders are often appealable, but if the court made a legal determination based on facts adduced at trial going to the general issue of the case the order would not be appealable. *United States v. Sisson, supra.*

LOOKING AT THE ISSUE FROM THE POINT OF VIEW OF THE FISH.

It has been related that a great American humorist was once asked on a final examination paper to discuss a fishing treaty between the United States and Canada first from the point of the United States and then from the point of view of Canada. He declined to discuss it from either point of view, deciding that it might be

more politic to discuss it from the point of view of the fish. Certainly it seems absurd to discuss the issue of fishing treaties from the fish's point of view but to discuss the double jeopardy clause from the point of view of those accused of crime who have won at trial is not absurd at all.

Ronald Jenkins is not the United States of America, after all. Although our Government in seeking justice for all can pursue a citizen from the district court up to the Supreme Court with no noticeable attrition, it cannot be said that the individual can withstand such an onslaught as readily as a government. If it is true as the Court of Appeals in the instant case reports (App. A.p.7a) that in the thirteenth century the bar against multiple prosecutions assumed a rather grim urgency, since after many trials by battle only the hardiest combatants would survive, this is equally true today. The individual citizen is bound to come away from any battle with the resources of his Government with life long scars. If he is guilty of the offense, such scars are not too much for him to bear for going afoul of his fellow citizens. When, however, he is able to prove his innocence before a judge or jury, there should come a time when he ceases being an accused person and becomes again an ordinary citizen. This time should be after a final determination on the merits of the case after trial in which both sides have the opportunity to produce evidence in their behalf. This is all that the respondent has been requesting.

On February 24, 1971, Ronald Jenkins was not inducted into the armed forces of the United States. It is now the latter part of 1974, three and one half years after his induction date and two years after the district

court rendered a final determination in his favor after trial. To this date, Ronald Jenkins is not a completely free man while his case is still pending. This two year delay scarcely conforms with the notion of diligent prosecution under section 3731 of Title 18 United States Code. Such a delay only adds to the harassment and turmoil that the double jeopardy clause was bound to prevent and your respondent urges this as an independent ground for this Court's affirming the Court of Appeals finding of lack of jurisdiction, App. A. p. 3a.

CONCLUSION

The judgment of the Court of Appeals should be affirmed on the ground that section 3731 of Title 18, U.S.C. and the Fifth Amendment Double Jeopardy Clause prohibit an appeal from the judgment of the District Court.

And further the judgment of the Court of Appeals should be affirmed on the ground that the appeal in the within matter has been unjustifiably delayed in violation of the express provisions of Title 18 U.S.C., Section 3731.

Respectfully submitted,

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